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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 53

CLYDE WILKERSON, PETITIONER,

v.s.

WILSON McCARTHY AND HENRY SWAN, AS TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED MAY 16, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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OF THE STATE OF UTAH

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N THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

77564

CLYDE WILKERSON, Plaintiff,

VS.

WILSON McCARTHY and HENRY SWAN, as Trustees of The Denver and Rio Grande Western Railroad Company, a Corporation, Defendants

COMPLAINT—Filed May 27, 1946

Comes now the plaintiff and for cause of action against he defendants, complains and alleges:

1. That at all times herein mentioned the defendant, Denver & Rio Grande Western Railroad Company, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do business in the State of Utah as a foreign corporation, with its principal place of business in Utah, at Salt Lake City, Utah, and that prior to the occurrence of the grievances herein complained of, the defendants, Wilson McCarthy and Henry Swan, were duly appointed trustees of all of the property of the defendant, Denver & Rio Grande Western Railroad Company, by the United States District Court for the District of Colorado in reorganization proceedings then and therein pending under the provisions of Section 77, Chapter VIII, of the Federal Bankruptcy Act, as amended, and that at all times herein mentioned all of the property of the defendant, Denver & Rio Grande Western Railroad Company, was in the possession and control of said defendant trustees, and aid defendant trustees ever since their said appointment fol. 2] have been, and now are, operating the railroad and all of the property of the defendant, Denver & Rio Grande Western Railroad Company, under the orders and directions of the said United States District Court.

2. That at all times herein mentioned, the defendants were acting as a common carrier by railroad and engaged

in interstate commerce and the injuries to plaintiff herein-after complained of arose in the course of and while plaintiff and said defendants were engaged in the conduct of interstate commerce.

3. That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., 51 et seq.

4. That the accident causing injuries to plaintiff and out of which this cause of action arose happened at about the hour of 10:30 A. M., on the 26th day of July, 1945, as a result of plaintiff falling into the wheel pit at a point a short distance to the west of the west rail of Track No. 23½ in defendants' coach yards in Denver, Colorado.

5. That at the time of the occurrence of the grievance herein complained of and for a long time prior thereto, the plaintiff had been employed by defendant as a switchman in defendants' yards in Denver, Colorado, and in the usual and ordinary performance of his duties as a switchman it became and was his duty to work upon and along the various switch and lead tracks within defendants' said yards in Denver, Colorado.

6. That shortly prior to the occurrence of the grievance herein complained of, it became and was necessary for plaintiff to be and to work within the vicinity of Switch Track No. 23½ at and near the point where said track passes over the wheel pit; that said track No. 23½ extends through a portion of said yards in a northerly and southerly direction; that the wheel pit is approximately 11 feet deep and 4½ feet wide, with cement walls and floor, and passes [fol. 3] underneath said Track No. 23½ and other switch tracks and extends through a portion of said yards in an easterly and westerly direction, and that in the performance of his duties under his employment as a switchman it became and was necessary for plaintiff to cross over said wheel pit at a point several feet west of the west rail of said Track No. 23½ and while passing over said wheel pit, due to the negligence, carelessness and recklessness of the defendants hereinafter alleged, plaintiff was caused to and did lose his footing and fall violently to the bottom of said wheel pit, and to thereby sustain the grievous personal injuries, loss and damage herein set forth.

7. That defendants, and each and all of them, were careless, reckless and negligent at said time and place aforesaid in the following particulars:

A. That defendants failed and neglected to furnish plaintiff a safe place wherein and whereon to do and perform the duties necessarily incident to his employment, in this, that it failed to place a safe or substantial covering over the top of said wheel pit at the point where plaintiff and other switchmen were required to cross and pass over said pit in the usual and ordinary performance of their duties, but, on the contrary, caused to be placed over the top of said wheel pit a loose plank which was not firmly set, affixed or attached to the side walls of said pit and that due to the insecure fashioning and installation of said plank the footing was insecure and infirm and said plank would and did turn and shift as men were walking over it, and as a result of said condition the plaintiff, while passing over said plank, was caused to lose his balance and to fall violently to the bottom of said pit and thereby sustain the grievous personal injuries herein complained of.

B. That defendants failed to furnish plaintiff a safe place wherein and whereon to do and perform the usual and [fol. 4] ordinary duties incident to his employment, in this, that they required him to pass over the wheel pit aforesaid in the performance of his duties at a time when the plank placed across the top of said wheel pit was insecurely attached and due to said condition plaintiff was thereby subjected to an uncommon hazard and danger which made the performance of his duties dangerous and unsafe, and that while engaged in passing over said wheel pit in the usual and ordinary performance of his duties he lost his balance and fell to the bottom of said pit and thereby sustained the grievous personal injuries, loss and damages herein complained of.

C. That the defendants failed to furnish plaintiff a safe place wherein and whereon to do, perform and discharge his duties necessarily incident to his said employment, in that they failed to furnish a safe walkway across and over said wheel pit, but in lieu thereof placed across said wheel pit, for the use of its switchmen and other employees in crossing over said pit, a single plank approximately 20 inches in width, and that at the time plaintiff was required

to cross over said pit on the plank aforesaid, the defendants had caused and permitted grease, oil and other slippery substance to accumulate and remain upon said plank; that as plaintiff stepped upon said plank to cross over said pit, due to the narrow width of said plank and the grease and oil thereon plaintiff was caused to slip, lose his balance and fall to the bottom of said wheel pit and thereby sustain the grievous personal injuries, loss and damage herein complained of.

8. That by reason of each and all of the aforesaid acts of negligence on the part of the defendants, and each of them, in the maintenance and management of their yards and tracks as herein set forth, combined and concurring, the plaintiff, while in the usual, ordinary and customary performance of his duties was caused to fall to the bottom of the wheel pit aforesaid and to thereby suffer the grievous injuries, loss and damage herein set forth.

[fol. 5]. 9. That as a direct and proximate result of the negligent acts and conduct of the defendants aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered, both externally and internally, and received the following injuries, to wit:

- A. A severe sprain of the right ankle.
- B. Severe and painful bruises, contusions, lacerations and wounds on his right hand and forearm.
- C. Fracture of two ribs on the right side, causing said ribs to be torn from their attachment to the breast-bone.

10. Plaintiff further alleges that as a direct and proximate result of the careless, reckless and negligent conduct of the defendants as herein alleged, he suffered and has continued to suffer severe shock to his nervous system and injury and impairment to his general health, and that he has suffered mental — physical pain ever since said accident occurred and is reasonably certain he will suffer mental and physical pain for a long time in the future; that due to his injuries aforesaid, the plaintiff was disabled and for that reason unable to engage in any gainful occupation whatsoever for a period of approximately three months, and that since returning to his employment he has continually suffered from pain in his right arm and right ankle, has been nervous, indisposed and unable to rest properly and that he has suffered from unnatural and

uncommon fatigue in the performance of his work and from a general disability.

11. That as a result of the injuries suffered by plaintiff as herein alleged, he was caused to lose earnings from his employment for a period of approximately three months, and that he has suffered pain, injury and physical disability ever since said accident occurred all to his damage in the sum of \$10,000.00.

Wherefore, Plaintiff Prays judgment against the defendants and each and all of them, in the sum of \$10,000.00, and for his costs herein expended.

Rawlings, Wallace & Black, Attorneys for Plaintiff.

(Duly verified.)

[fol. 6] In DISTRICT COURT OF SALT LAKE COUNTY

ANSWER—Filed June 19, 1946

Come now the defendants and answer the complaint as follows:

1. Admit the allegations contained in paragraphs I, II and III.

2. Answering paragraphs IV, V, VI, VII, VIII, IX and XI, defendants admit that plaintiff on July 26, 1945, at about 10:30 a. m., fell into the wheel pit in defendants' coach yards in Denver, Colorado; that prior to the time of said accident plaintiff was employed as a switchman in defendants' yards in Denver, Colorado; that Track No. 23½ extends in a northerly and southerly direction through a portion of defendants' yards; that the wheel pit is approximately 11 feet deep, 4½ feet wide; with cement walls and floor, and passes underneath Track No. 23½ and other switch tracks in an easterly and westerly direction; that plaintiff fell to the bottom of said wheel pit and sustained personal injuries, the extent of which are not known to these defendants; and that as a result of such injuries plaintiff was disabled for some period of time; deny each and every other allegation contained in said paragraphs.

3. Answering the allegations of paragraph X, defendants allege that they do not have knowledge or informa-

tion sufficient to form a belief as to the truth or falsity of the allegations therein contained and upon that ground deny each and every such allegation.

4. Further answering said complaint, defendants allege that if the plaintiff met with an accident and sustained injuries as alleged in his complaint, his own failure to exercise reasonable care contributed thereto and was a proximate cause thereof.

5. Further answering said complaint, defendants allege [fol. 7] that if the plaintiff met with an accident and sustained injuries as alleged in his complaint, his own failure to exercise reasonable care was the sole proximate cause thereof.

Wherefore, defendants pray that they be dismissed with their costs.

Grant H. Bagley, Dennis McCarthy, Farnsworth & Van Cott.

(Duly Verified.)

Received copy of the foregoing answer this 19th day of June, 1946.

Rawlings, Wallace & Black.

[fol. 8] IN DISTRICT COURT OF SALT LAKE COUNTY

MINUTE ORDER OF TRIAL

This case comes now on for trial, Parnell Black appearing in behalf of the plaintiff, Grant H. Bagley, and Dennis McCarthy appearing in behalf of defendants. A jury of eight (8) persons is impaneled, to-wit:

1. Maud Morgan.	5. Harry L. Courtwright.
2. Wm. J. Clark.	6. Louis C. Jacobsen.
3. Laura M. Lether.	7. Edwin Butterworth.
4. Jesse K. Burrows.	8. Leonard Hall.

Comes now Parnell Black, counsel for the plaintiff and makes his opening statement, counsel for the defendants reserving his opening statement. Whereupon the following persons are sworn and examined in behalf of the plaintiff: Gordon H. Arbogast, Clyde Wilkerson, Mrs.

Clyde Wilkerson. The depositions of *depositions of* Dr. Albert H. Good and Gordon H. Arbogast are published in open Court. Plaintiff rests. Dennis McCarthy, counsel for the defendants, makes his opening statement. Whereupon Everett William Ellege and Anders G. Johnson are sworn and examined in behalf of the defendant. This being the hour of adjournment further trial of the case is continued to Thursday, October 3, 1945 at the hour of 10 o'clock A. M.

[fol. 9] IN DISTRICT COURT OF SALT LAKE COUNTY

MINUTE ORDER OF TRIAL

The trial of this case having been continued to this time, the jury heretofore impaneled, respective counsel and all interested parties being present, further trial is resumed. Whereupon George P. Hawkins and Clyde Wilkerson are sworn and examined in behalf of the defendants. The deposition of Clyde Wilkerson is published in open Court. Documentary proof is received in evidence in behalf of the defendants. Defendants rest. Clyde Wilkerson and Gordon H. Arbogast are recalled in rebuttal in behalf of plaintiff. Plaintiff rests. Defendants rest. Both sides rest. Comes now counsel for defendants and submits a written and oral motion for a directed verdict and said motion is stated into the record. The said motion is argued to the Court by respective counsel and submitted. The Court being fully advised in the premises, it is ordered that said motion be and the same is hereby granted and the jury directed to return a verdict in favor of the defendants and against the plaintiff, and juror Edwin Butterworth, Foreman, is directed by the Court to sign the following verdict:

"We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff, "No Cause of Action."

(Signed) Edwin Butterworth, Foreman.

October 3, 1946.

The jury is thereupon discharged from further consideration of this case and excused, subject to call.

[fol. 10] IN DISTRICT COURT OF SALT LAKE COUNTY

DEFENDANTS' MOTION FOR DIRECTED VERDICT—Filed
October 3, 1946.

Come now the defendants, Wilson McCarthy and Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company, a corporation, and each of them, and move the court to instruct the jury to return a verdict in their favor and against the plaintiff of No Cause of Action. This motion is based upon the following grounds:

1. No evidence has been introduced which proves or tends to prove that the defendants or either of them were guilty of negligence in any of the particulars set forth in the plaintiff's complaint, or at all.
2. No evidence has been introduced which proves or tends to prove that the plaintiff was required in the performance of his duties as a switchman to cross over the wheel pit while the pit was open and car men were using the pit in order to repair cars; or that the defendants owed any duty to the plaintiff to provide him with a walkway or means of passing over the wheel pit while the same was open and in use by the car men.
3. No evidence has been offered or received which proves or tends to prove that the defendants should have foreseen or anticipated that the plaintiff, in the performance of his duties as a switchman, would undertake to pass over the wheel pit by means of the board while the pit was open and in use by the car men, and while the guard chains were up and in place along the sides of the pit.
4. The evidence shows conclusively that the defendants provided the plaintiff with a safe place in which to perform all of the duties required of him; that the plaintiff was not [fol. 11] required in the course of his duties to cross over the pit while the same was in use by the car men; that at the time of the accident the pit was in use by the car men and the guard chains were in place; that the guard chains operated as a warning to the plaintiff and other switchmen that the wheel pit was open and in use by the car men and that it was dangerous for switchmen to attempt to pass over the wheel pit by means of the board, or other means; that the board from which the plaintiff fell was not designed or

intended as a means of enabling switchmen to cross over the pit while the pit was open and in use by the car men.

5. The evidence shows conclusively that the plaintiff understood and appreciated the danger of attempting to cross the wheel pit while it was open and in use by the car men and understood that the guard chains were a warning to him not to attempt to cross the pit. Notwithstanding such knowledge and appreciation he undertook to cross the pit by means of the board and his own negligence in so doing was the sole proximate cause of the damage and injury of which he complains.

6. The evidence shows conclusively that the board across the wheel pit which plaintiff attempted to use was securely attached to the side walls of the pit; that it did not shift or turn when men were passing over it and was in all respects safe and secure for all use and purposes for which it was designed and intended; that the board was designed and intended for use by car men while the pit was in use by them for the purpose of repairing cars; that when the pit was not open and in use for repairing cars the top of the pit was covered by placing other boards alongside the board from which the plaintiff fell; that the board in question was in all respects secure, safe and sufficient as a crossway over the pit for plaintiff and any other employees when the top of the pit was covered by other boards and defendants were under no duty to keep the board safe or secure for use by [fol. 11] the plaintiff when the pit was open and in use by the car men.

7. No evidence has been offered or received which proves or tends to prove that the plaintiff slipped or fell from the board by reason of any oil, grease, or other slippery substance on the board, and no evidence has been offered or received which proves or tends to prove any defect or insufficiency in the board or that it was loose or insecure when the plaintiff fell from it, or at any other time.

Farnsworth & Van Cott, Grant H. Bagley, Dennis McCarthy, Attorneys for Defendants.

[fol. 13] IN THE DISTRICT COURT OF SALT LAKE COUNTY

VERDICT—Dated October 3, 1946

We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff, "no cause of action".

Edwin Butterworth, Foreman.

Dated Oct. 3rd, 1946.

[fol. 14] IN DISTRICT COURT OF SALT LAKE COUNTY

JUDGMENT ON VERDICT—Filed October 3, 1946

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of — persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called, answered to their names, and say they find a verdict for the defendants and against the plaintiff

"We, the Jurors impaneled in the above case, find the issues in favor of the defendants and against the plaintiff "No cause of action."

Dated Oct. 3rd, 1946.

Signed: Edwin Butterworth, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said — have and recover from — the sum of — Dollars with interest thereon at the rate of — per cent per — from the date hereof till paid, together with said — costs and disbursements incurred in this action, amounting to the sum of — Dollars.

Judgment entered Oct. 3rd A. D. 1946.

[fol. 15] IN DISTRICT COURT OF SALT LAKE COUNTY

NOTICE OF APPEAL—Filed November 18, 1946

To the above named defendants, and to Farnsworth & Van Cott, Grant H. Bagley, and Dennis McCarthy, their attorneys:

You and each of you will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Utah from judgment rendered in said District Court on the 3d day of October, 1946, in favor of said defendants and against the plaintiff, said judgment having been made and entered on the verdict of the jury of no cause of action, which said verdict was rendered by the jury upon the order and direction of the Court.

Dated, this 18th day of November, A. D. 1946.

Rawlings, Wallace & Black; Attorneys for Plaintiff.

Service of the foregoing Notice of Appeal and a true copy thereof is hereby acknowledged this 18th day of November, A. D. 1946.

Farnsworth & Van Cott, Grant H. Bagley, Dennis McCarthy, Attorneys for Defendants.

[fol. 16] IN DISTRICT COURT OF SALT LAKE COUNTY

ORDER SETTLING BILL OF EXCEPTIONS—November 13, 1946

The Bill of Exceptions having been filed and there being no objections thereto, it is ordered that the said Bill of Exceptions be, and the same is hereby settled and approved as to all parties.

[fol. 17] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 18] IN DISTRICT COURT OF SALT LAKE COUNTY

Portions of the Bill of Exceptions

GORDON H. ARBOGAST, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Arbogast, you may state your full name and your address, please.

A. Gordon H. Arbogast, 2814 West Third Avenue, Denver, Colorado.

Q. You spell your last name A-r-b-o-g-a-s-t?

A. Yes, sir.

Q. You are acquainted with Mr. Wilkerson, are you not?

A. Yes, sir, have been for several years.

Q. And you have worked with him there in the yards at Denver for many years, have you not?

A. Yes, sir.

Q. What is the nature of your employment?

A. I'm engine-foreman at the time now, but I have switched cars there for—in the neighborhood of twenty-six years.

Q. You are acquainted with the—well, withdraw that. You are employed by the defendant in this case, the trustees of the Denver and Rio Grande Western Railroad Company?

A. Yes, sir.

Q. And you are acquainted with their yards, the Burnham yards in Denver, are you not?

[fol. 18a]. A. Yes, sir.

Q. And has there been within these yards—you have seen the 27 years of switching service you mentioned to the jury?

A. Yes, sir.

Mr. Black: Now, your Honor, may the record show the defendant has presented for consideration of the court and jury its Exhibit 1, Defendant's Exhibit 1?

Mr. Bagley: I think it is Exhibit 2, Mr. Black.

(Discussion.)

The Court: That includes both the structure of the tracks and this pit—the wheel pit and the car on Exhibit 2?

Mr. Bagley: Yes, your Honor.

The Court: All right, it is by agreement of counsel received in evidence.

Mr. Black: It is received now in evidence?

The Court: Yes.

Q. Mr. Arbogast, have you had an opportunity to examine this miniature that is offered and received in evidence as Defendant's Exhibit 2?

[fol. 19] A. No, sir, I haven't.

Q. Will you now look it over because I desire to ask some questions about it?

Mr. McCarthy: Scale of that is one foot to a quarter of an inch.

Q. One foot to a quarter of an inch. Mr. McCarthy has advised you this is drawn to scale by the engineering department of the defendant on the scale of one foot to a quarter of an inch. I will ask you if the exhibit, Exhibit 2, appears to you to be a fair and accurate likeness of the wheel pit in the Burnham yards of the defendant at Denver and track 23½ and other tracks?

A. Yes, sir, it does.

Q. And having examined the exhibit, I will ask you to state what the switching crews use track 23½ for, generally?

A. Well, they use it for, to change wheels and jack boxes, or any repair work that requires a pit.

Q. Requires a pit?

A. Yes, sir.

Q. Do you recall approximately when the pit was established?

A. No, sir, I can't recall that, but I'd say off-hand that it has been there probably six or seven years.

Q. I call your attention to the safety chains attached to the post immediately to the west of the car that is standing on track 23½, will ask you about when those chains were placed as they appear to be on the exhibit?

A. Well, they were placed—the posts and chains were placed after the pit was in service and built for quite a while, but I don't know the exact time that the chains and posts has been placed there.

Q. But when I request you—Mr. Arbogast, what are the usual duties of a switchman engine foreman there in the yards?

A. Well, in this case it would be the duty of the engine [fol. 20] foreman to see that the pit was in shape to pull the car off—that the rails, you understand, detach and go down in or shove up—could be displaced and see that there were no blocks under the car that would cause the car to derail on the pit, and also look for bad order cars which we work, but—that is what we work—but when a car goes for the pit, we look for a bad order card, and when we go to remove the car, we have to examine the car for a bad order card, and still on there, we do not remove the car from the pit.

Q. You spoke of one thing that is of interest to me at this time, and I desire that you come down to the exhibit before the jury and explain just what the engine foreman's duties are with reference to inspection of the tracks that go across the pit. You desire to use the pointer, I now hand it to you?

A. Now, this is the pit and under here is the track that comes up under the car. You can't see it there for the wheels, but it lets down in the pit or you can shove it up, protrude up, and when an engine foreman—when the car is placed on the pit, he looks for this track to be lined up, or should look. That is his duties, and he should look for cars and also examine the wheels under the car for blocks which sometime they leave blocks under there which could cause derailment of the car.

Q. Now, this track that you have spoken of, do I understand that that track is built on a special mechanism that permits it to be lowered into the pit and raised up flush with the rails?

A. Yes, sir, it comes onto the pit on—there is a concrete wall, as you will notice here, that is built in there and it comes flush just like that. When you see that board there, when the boards are covered over, that is the way the pit is covered up. Now you see here there is the board that goes in here next to it—that's removable now.

Q. Yes?

A. And here there is a board that goes in here that can be [fol. 21] removed when the workmen are working, but there is a permanent board that—it seems to me like this board sets farther to the west than actually it should. Now, when you are walking in, here is your ear and when I walk in, I catch hold with this hand, just reach over, get the post and

go through—step on the board and catch the post with my other hand and go through. That is the way I walk through it.

Q. That is when you are walking through here?

A. Yes.

Mr. McCarthy: That between the post and onto the board, then through it?

A. Yes, sir.

Q. As you are going north?

A. Yes, as you are going north, you just reach up with your hand, cut through, reach up and put other hand on the board, and step around it. It isn't a great deal of trouble, and here if you—now, the pit runs crosswise like that, as you see here the east, and you would have to walk all the way around the pit, you understand, and poor old switchman that is working there is plenty tired, he don't feel like making lot of extra steps.

Q. You may take the witness stand, Mr. Arbogast, got little ahead of my story. Now, Mr. Arbogast, what is the condition—the usual condition of the pit when the men are not working in repairing wheels and jack boxes, and things of that kind?

A. It's covered with those boards. There is boards fits into cover the entire pit, and the posts and chains are released, they pull it up out the hole and set back out of the way between tracks 4 and 23½.

Q. In other words, when the men are not working in the pit, the post to which the chain is attached is left out of the hole?

[fol. 22] A. Yes, sir.

Q. On each side?

A. And laid back in that position where you see there between the tracks.

Q. By the way, identifying tracks, now, will you tell the jury what is the number of the track at the extreme west here?

A. That is 24 track.

Q. And the next track?

A. 23½.

Q. Is this that I am speaking—now, start over again. What is the number of the track that the—

A. 23½, Mr.—

Q. All right, the track next to the, to the west?

A. Well, I would call that there west of the wheel pit.

Mr. McCarthy: We will agree it is called "wheel track."

A. Sir?

Q. The wheel track?

A. Why, 24 doesn't penetrate the pit at all.

Q. The track on the east here at the extreme west is 24?

A. Yes, sir.

Q. The track next to it is the wheel pit track?

A. Yes, sir.

Q. And the track upon which the car is standing is track 23½?

A. 23½, yes, sir.

Q. Track over to extreme east?

A. I always call it the west and the east wheel pit as I stated before—to these gentlemen.

Q. Let's agree on that, Mr.—

Mr. McCarthy: Let's call that track 24.

Q. You mean clear over to the east?

[fol. 23] A. No, don't call track—

The Court: Off the record, Miss Reporter.

(Discussion.)

Mr. Black: I want the record straight, your Honor. I go now through it: The track on the extreme west is track 24, the track immediately to the east of it is the wheel pit track. The track next to the—upon which the car is standing is track 23½, and the track over to the extreme east is track 23.

Mr. McCarthy: Correct.

Mr. Black: All right.

Q. Now, Mr. Arbogast, when the workmen are not working in the pit, then, the posts are removed from the holes and placed over to the west of the permanent posts?

A. Yes, sir, laid down out of the way.

Q. Between tracks 24 and the wheel pit track?

A. Yes, sir, in that vicinity.

Q. And then the wheel pit then is covered, the top of it is covered with boards that go across?

A. Yes, sir.

Q. Mr. Arbogast, since the chains and the posts were installed there at the wheel pit, what if anything have you noticed with respect to the practice of men passing between cars standing on 23½ and the posts to which the safety chains are attached?

Mr. McCarthy: I object to that question, your Honor, on the ground Mr. Black is assuming something, conclusion which is not yet in evidence when he refers to a "practice".

Q. To satisfy the objection, I will—Mr. Arbogast, I want you to answer this question yes or no: have you noticed any particular practice and observed any particular practice with reference to switchmen and workmen passing between the safety posts when they are in place, and I refer to the posts immediately to the west of standing cars, and the standing cars, since these posts and safety chains were set up?

[fol. 24] A. Yes, sir.

Mr. McCarthy: Object to that—

A. I have.

Mr. McCarthy: —question on the same ground, on the ground still leading, substantially the same question.

The Court: Objection overruled; if you would like to ask him any questions on voir dire as to the extent of his knowledge of such things or consideration of it, you may, but he has answered that question, "yes".

Mr. Black: Said he had observed a practice.

The Court: It may stand in the record.

Q. And what have you noticed with reference to the practice of men passing between the standing cars on 23½ and the posts that hold the safety chains?

A. Well, they would walk through and get on the board and walk to and from each side, and the men that work on the pit work on that board, and sometimes set on the board next to the—in next to the car there to perform their work, you know, like where they are up under, or working on the car, they use the board over from it to work on.

Q. Were you working there in the yards when these posts, safety chains, were installed?

A. Yes, sir, I was, I must have been.

Q. Have you worked there since that time continuously?

A. Yes, sir.

Q. What has been your practice in passing between cars that are standing on 23½ and the posts that hold the stakes and chains when they have been in place?

A. When I have occasion to pass through there, I put my hand on the post, step over on the board, and go around the other post, and that is the way I pass to and from on [fol. 25] the pit.

Q. Have you observed other men passing over the pit under similar circumstances?

A. Yes, sir, I have.

Q. And what can you say with reference to the—such occurrences, as to how often they happen?

A. O, I would judge that I saw the men pass through there dozens of times. I worked there and I go to work at three o'clock, and the men doesn't quit until four, and the pullman company, they have their work done on that pit, the Rio Grande Company does their work there nearly all the time. All through the war, they were fixing cars and I go to work and I am the only engine—that is my regular work, the coach yard engine, and I would always do that particular work. You know, what was to do after three o'clock, and it would—you know men work with you, you would see them walking numerous times, numbers of times, you know.

Mr. Black: You may cross-examine.

Cross-examination.

By Mr. McCarthy:

Q. Mr. Arbogast, you stated that you've been employed in the yards, did you not, for a number of years?

A. Yes, sir.

Q. How many years would you say?

A. I have been working there going on 26 years; that is my seniority that I hold there.

Q. And how long in the yards at Burnham?

A. Oh, I have been there in the Burnham yards practically all my work probably I have did, helping and working that engine crew. I wouldn't state this for sure, but I expect it would amount to sixteen or seventeen years altogether [fol. 26] with my helping and foreman on the engine.

Q. And of course you have brought cars in there and put them over the—spotted them over the wheel pit?

A. In fact, I do it every day.

Q. And—

A. If there is anything at all.

Q. You know when you bring a car in there, that it is a bad order car when you bring it in, do you not?

A. Yes, sir.

Q. Wouldn't come there unless it was a bad order car, is that correct?

A. Well, that—could be that it would be put in there if it wasn't bad order. They put them in there to examine the boxes and the wheels.

Q. That is the purpose—

A. The purpose of it is to see if it is bad order and also fix bad orders.

Q. And now you say that—what shift is it you work?

A. I work from three to eleven.

Q. From three to eleven?

A. Three P. M. till eleven P. M.

Q. And Mr. Wilkerson, what shift is it he works?

A. He works now, I think he is working seven A. M. till three P. M.

Q. Now, on the shift that you work from three until eleven, I believe that you stated that on that shift the regular car men are usually through with their work, are they not?

A. Well, they are working on the pit lots of days.

Q. Can't you just answer my question: on your shift, isn't it true that the regular car men are usually through with their work?

[fol. 27] A. I go to work at three o'clock and get over there, and they work one hour; they have one hour to work.

Q. Regular car men usually work from seven until three, or seven until four?

A. Four, yes, sir.

Q. And you work from three till eleven, so there is an overlap of one hour?

A. One hour, yes, sir.

Q. But, ordinarily, at four o'clock, the regular car men are through with their work, isn't that correct?

A. That's correct.

Q. And ordinarily when the regular car men are through with their work, the chains—safety chains—are removed

from the pit and the pit cover boards will be entirely over the pit?

A. That's correct.

Q. That is correct; and so that during most of the time that you are on duty from three until eleven, the safety posts are down, the safety chains are down, and the pit is completely covered up, and of course people go back and forth on these boards over the pit, which is completely covered, is that correct?

A. No, sir, that isn't exactly correct.

Q. During most of the time when you are on shift, that is the situation?

A. Please let me tell you how I work. I go to work and the day shift or maybe some extra engine leaves cars on the pit to be completed. All right, I go over each and every day to see and examine to see if the cars are completed and nearly every day I get cars off those pits.

[fol. 28] Q. Now, just a moment, just answer my questions.

A. All right, sir.

Q. You are on the shift from three to eleven?

A. Yes, sir.

Q. And you just stated that during most of that time, the cover boards are on the pit, and the safety chain posts are removed, isn't that correct?

A. When there is no one working there.

Q. Yes; there is, of course, emergency work that is occasionally done there, but during most of the time that you are on shift, the cover boards are on the pit and the safety chain posts are removed and safety chains are removed; isn't that correct?

A. I would say it might take the majority of the time I am on duty.

Q. Most of the time?

A. But—that they are down. There has to be—

Q. Of course, during that time it is perfectly proper for people to go across the cover boards all the time—right?

A. You don't have the pit covered all the time, Mr.—

Q. When men are not working on the pit?

A. That's right, yes, sir.

Q. Then the pit is covered?

A. Yes, sir.

Q. And the safety chain posts are removed?

A. Yes, sir.

Q. Then of course people go back and forth on the boards all the time over the pit; that is true, isn't it?

A. Well, it is necessary to go across—they would go backwards and forward when the pits is closed.

Q. It is perfectly safe, perfectly proper?

[fol. 29] A. Yes, sir.

Q. And there are no chains up there at all?

A. I don't say there isn't any chains up; they should be removed when laid down.

Q. That is usually the situation, is it not?

A. Yes, sir.

Q. So that, your testimony as to the pumerous occasions when men—you have seen men squeeze around the ends of the chains and over the cover board, then squeeze around the end of the other post and over the pit, your testimony is subject to the limitation you have just stated, is it not, that during most of the time that you are on duty, that the pit is covered, covered up with the cover boards and the chains are removed, subject to that limitation, is it not?

A. Well, I'd say that if the pit was uncovered, the actual 24 hours, you would only have a couple—

Q. Just a minute, I asked you if your testimony as to the times that people have gone over there wasn't subject to the limitation you have just admitted that it—during most of the time when you are on duty, the cover boards are on the pit, and the chains are down; now, can't you answer that?

A. Yes, sir, that would apply to the three o'clock shift. It would be the most of the period.

Q. So that your testimony as to these occasions would be subject to that limitation, isn't that right?

A. Well, I guess so, at that.

Q. And now you stated, I believe, that the wheel pit was installed several years ago at the time the yards were made, and that thereafter the safety chain posts were put up?

A. Yes, sir.

[fol. 30] Q. You didn't recall when that—those chain posts were put up, but would it be an unfair estimate that these chain posts were installed around the first part of May, 1945?

A. Well, sir, I wouldn't say; I couldn't say because, as I stated before—

Q. You don't dispute that that might be the fact?

A. It could be the fact, yet, sir.

Q. So that if that is the fact, which of course will be—

Mr. Black: We will stipulate, Mr. McCarthy, you state in the record what the fact is, we will stipulate that that is the fact.

Mr. McCarthy: I understand it is, but I would rather wait for my witnesses to make the statement.

Q. If it is true that these safety chain posts were installed the first part of May, 1945, then your testimony regarding these occasions when men went across the pit when the chains were up and the cover boards were off, would also be subject to that limitation, would it not?

A. It certainly would, yes, sir.

Q. You didn't refer to any occasions when the chains were not up and a car wasn't on 23½ and the boards were not off?

A. Yes, sir, I did refer to—before the boards were put up, we walked the board on the pit just the same as we did.

Q. You mean before the chains were put up?

A. Before the chains, yes, sir, were put up to the pit.

Q. Before the chains were put up and when the pit was open, you walked just the same as you do now?

A. Yes, sir.

Q. And since the safety chain posts have been installed and the safety chains have been put around three sides of [fol. 31] the pit, you do just the same as you always did?

A. Still, yes, sir; if I have the occasion, that is the way I cross through there on the board.

Q. So that some of the occasions that you refer to were occasions that occurred before the safety chain posts were installed?

A. Yes, sir, it would naturally be that way, because, as I stated to you, I have worked there on the pit all these years, you know, did the coach work, and I would see the men working to and from the pit and lots of times I have occasion to go to the pit to look for a car, when I would move anything off the pit.

Q. So that your testimony, also, is subject to another limitation, namely, that some of these occasions you refer to occurred before safety chains were installed?

A. Yes, sir.

Q. Around the pit. Now, Mr. Arbogast, on the occasions that you have gone between the car standing on 23½—

A. Yes, sir.

Q. — and the safety chain post, was it necessary when you did go in between that space—rather a narrow space there, is it not?

A. Yes, sir, it isn't a large—

Q. You couldn't walk straight ahead; it was necessary for you to turn sideways, was it not?

A. That's right.

Q. And not only turn sideways, but to squirm between posts and the car; is that correct?

A. No, sir, you do not have to squirm.

Q. Well, would you say a correct word would be "crawl"?

A. No, sir, the correctness of that wouldn't be "crawl".
[fol. 32] Q. Do you recall at the time that you gave your deposition under oath in Denver, Mr. Arbogast?

A. Yes, sir.

Q. And on page 24 and 25 of that deposition—on Page 24, I asked you this question, referring to this same opening—

A. Yes, sir.

Q. "Can you estimate it?"

Mr. Black: Which page now?

Q. Page 24, the last question on the page: "Question," that is referring to the distance between the post and the car, "Can you estimate it?"

A. I stated—

Q. Now, just a moment, you answered, "Well, you have got to crawl through there now. I will leave that to your judgment." Did you so state?

A. Well, I might have made that assertion in the way—in this way—

Q. Just a minute, did you make the assertion in Denver at the time this deposition was taken?

A. I might have made that statement, yes, sir.

Q. Was it true?

A. Well, it was according to how you determine it, whether you would crawl, but I demonstrated to you at the time I made that assertion how I passed through the cavity.

Q. But you ^{did} make the statement, "crawl through there"?

A. I might have said "crawl." You can define a crawl if you care to.

Q. Can we use the word "crawl"?

A. You can define it that way if you care.

Q. You defined it that way. I am just referring to that. Then you crawl through there, and you were turned sideways.

A. Would you care for me to come down demonstrate to you?

[fol. 33] Q. No, just stay there; I will ask you the questions. You were turning sideways, and then you sort of pivot around the post; you are facing the post, are you not?

A. Yes, sir, I wouldn't—I don't know what you determine that, but I wouldn't say "pivot," I would say "slide" through.

Q. All right, "slide through," we will say. Now, does this model of the wheel pit show the approximate position that this cover board—so-called "stationary cover board," is usually located with reference to the chain posts?

A. Yes, sir, I would say it was something near.

Q. That is a fair representation?

A. A fair demonstration of it.

Q. That cover board, of course, is west of these chain posts. Now, would you turn with your—in going in, after you get through the space between the car and the post, would you turn your back to the chain in going westward, or would you still be facing the chain in going through there on these occasions?

A. Well, you would be facing south if you entered from the north.

Q. I see; so would your back be to the chain as you go from this distance?

A. No, sir.

Q. From east to west, before you get to the place where the cover board is and you can cross the pit, in going in, would your back be to the chain?

A. When you are walking across the cover board, if entered to the north, it naturally would be the back.

Q. You are facing the post, then you turn with your back to the chain, then you would have to take a few steps?

A. Your back is to the car as you slide through.

Q. Your back is to the car?

[fol. 34]. A. Yes, sir.

Q. Then from going from this chain to the board, is your back to the chain or the front of your body?

A. You would pass by the post as you walked across, if you entered from the north, your back would be naturally to the chain, as you walk south over the board.

Q. You would be walking sideways for a few steps, is that correct?

A. Oh, you might make one step sideways.

Q. One step sideways to the west; then across the floor, how many steps did you usually take to walk across the board?

A. I wouldn't have no idea, sir.

Q. Then you catch the post on the other side?

A. As you step off, yes, sir.

Q. And you go through the other side the same way you went through the first place?

A. Yes, sir; as I recall it, that is the way you would step off.

Q. Now in addition to being an employee of the Rio Grande Railroad, you are also chairman of the Switchman's Union of North America, are you not?

A. Yes, sir, I am local representative.

Q. Local chairman?

A. Yes, sir, in Denver.

Q. And you represented Wilkerson in the investigation in this case?

A. Yes, sir.

Q. And do you still represent him?

Mr. Black: According to what you mean by "representing" him, your Honor. Not one of his counsellors before this court and jury.

Mr. McCarthy: I will withdraw the question.

Q. You knew Wilkerson, you said, for a number of years; [fol. 35] about how many years?

A. Well, I have known him best part of the years I have worked there.

Q. About 25 years?

A. Yes, sir, something like that—twenty or twenty-five.

Q. You are acquainted with Mr. Wilkerson's wife?

A. Yes, sir, I know her as well as I know any of the employees' wives.

Q. But you are acquainted with her?

A. Yes, sir.

Q. And you have talked to Mr. Wilkerson a great deal about this case?

A. Not a great deal; I have discussed the case at several times with him, yes, sir.

Q. And there is one other point I wanted to ask you, Mr. Arbogast; when a car is brought in on the wheel pit, there is a blue flag ordinarily set out on that track, is there not?

A. Yes, sir.

Q. And what is the significance of that blue flag in railroad parlance?

A. Well, the flag has to be removed before you can couple the engine onto the car that's on the pit. That is what a blue flag is for is to—

Q. And if a car is brought in on the wheel track, or track 23½, where would the blue flag ordinarily be placed?

A. It would be placed to the south as it is a dead-end track to the north.

Q. This is a dead-end track here, here on this end, the north end?

A. Yes, sir, up next to the commissary, it is dead.

Q. So there would be just to the south of the car on track 23½; and who places that blue flag out there?

[fol. 36] A. I couldn't say as to that, but it's the car men's duties—

Q. Car men that are working on the car and on the pit?

A. That's right; the men that puts up the flag shuld remove it, but at all times that doesn't apply.

Q. Does anyone else have any authority to move that blue flag, other than the men that are on the pit that are working on the car?

A. No, sir, I would say they haven't.

Q. As a matter of fact, it is an inviolable practice in railroad yards, is it not, that only the men that put up the blue flag in situations of this kind would take the blue flag down?

A. I think that's right.

Q. Is that correct? Say "yes" or "no" so the stenographer can put it in the record.

A. I think that is correct.

Q. And when they are beginning work on a car, why they put the blue flag out, isn't that correct?

A. Yes, sir.

Q. And when they are through work on a car, they remove the blue flag, do they not?

A. They should, yes, sir.

Q. And when that blue flag is removed, then it is notification to anyone who may be concerned that the car—they are through with the car and the car is ready to be moved; isn't that the situation?

A. No, sir, that isn't. The situation is just this: that when the blue flag is removed, then the engine that's waiting for the blue flag to be moved, may proceed after moving the blue flag and make the coupling and move the car.

[fol. 37] Q. But it is the signal to that engine that the work is done on the car, is it not?

A. I didn't understand.

Q. It is a signal to that engine—

The Court: Removal of the flag?

Q. The removal of the flag is a signal to that engine that the work is done on the car, is it not?

A. Yes, sir, it would indicate—

Q. And that they can come in on the track and get the car?

A. Yes, sir.

Mr. McCarthy: I think that's all.

Redirect examination.

By Mr. Black:

Q. Mr. Arbogast, when these chains are up, how is the pit usually covered, having in mind the chains are up and there is a car on the track?

A. It is covered different ways, Mr. Black, it is according to where the men would be working on the car that the openings would be on the pit. You see the circumstances would govern there. It wouldn't be the same way at all times, I wouldn't think.

Q. Then the pit is open, but covered to accommodate the work that is being carried on?

A. Yes, sir.

Q. Now, when the chains are up and the car is standing on the track, is the board immediately adjacent to the west rail always in place and crosses over the pit?

A. Well, I couldn't say; it doesn't have to be, Mr. Black. They can remove it—or they can leave it. I have saw them sitting there on that board—it seems to me like I have noticed that a number of times, the workmen are using the [fol. 38] board to work on.

Mr. McCarthy: What board are you referring to?

Mr. Black: Board immediately adjacent to the rail.

Q. When there is a car standing on 23½ and chains are up, you may state whether or not there is usually a board across the pit immediately to the west of the posts?

A. Yes, sir, the board sets just to the west of the post.

Q. Is that usually there, you say?

A. Yes, that there is—now, I have always found it there, and I have had some of the men on the pit say that it wasn't—

Mr. McCarthy: We object.

Q. What they would say to you would be hearsay here and immaterial.

A. Well, I have always found the board there, so you could walk across the pit.

Q. Do you know of any use that is made of that board except for men to cross over the pit on?

A. No, sir, I don't know—

Mr. McCarthy: He has already testified the use of it.

Q. Mr. Arbogast, you wanted to come down and demonstrate to the jury how you passed between the car and the post. Now, will you come down and do the best you can, make a demonstration as to how you usually pass between the car and the post when the post is there and the chains are up. Go through from north to the south.

(Witness steps in front of the jury box.)

A. I walk in the—alongside the car, put that hand on the post, step on the board.

Q. You say "that hand"?

[fol. 39] The Court: Right hand on the post.

Q. That's right.

A. Yes, just put my hand on the post.

Q. Which hand?

A. I walk up, then catch the post like that.

Q. With which hand?

A. With my right hand.

Q. Mr. Arbogast, I want to explain to you we are making a record over here. When you say "that hand," could either be right or left, so as you make this description, you name the hand so get in the record.

A. I take my right hand and walk up to the post, catch on top, slide through, step on the board, slide through one side, then when come back, it is same performance, only posts is on the other side, on the left hand.

Q. I see; you may take the stand. Now, in using the word, "crawl," did you intend to indicate that you crawl down on your hands and knees, crawl like a child would crawl?

A. No, sir, I didn't; I didn't.

Q. Didn't do that. Your attention was called to a part of the answer that was given; I will ask you to state whether or not the complete answer that you gave in the deposition was as follows: I — now starting with the question at Page 24 and will complete answer on page 25 of the deposition:

"Q. Can you estimate it?

"A. Well, you have got to crawl through now, and I will leave that to your judgment. You got to cross through there and hold onto the post and walk around and step on the board and step out and catch the post on the other side. I would say probably there is twelve or fifteen inches there. Now, you mean, do you, from the bottom of the pit to the car?"

[fol. 40] Was that your answer as near as you can recall?

A. Well, I —

Q. No, no, I mean was that the answer you gave in the deposition as near as you now recall?

A. Yes, sir.

Q. Your attention was called to the blue flag rule on cross-examination; I will ask you to state whether or not a switchman has any duties to perform with reference to cars that are standing on 23½ over the pit, even though there might be a blue flag displayed at either end of the car?

A. No, sir, he has no jurisdiction or nothing whatsoever to do with blue flags, Mr. —

Q. He wouldn't have any jurisdiction of the blue flag, would he, for any duties to perform in the vicinity of the car?

Mr. Bagley: Object to it, your Honor, on the ground he has already answered the question, that it is repetitious.

The Court: I don't recall that, maybe it is repetitious, Mr. Bagley, but I think let him answer the question.

Q. Would the switchman have any duties to perform as switch foreman?

A. Yes, sir, he could have—you know, he could go down to see if they were, you know working on the car, how near through they was. If it was an emergency car they wanted to use, it would be very natural he could step down there and inquire about the car before the blue-flag—that would have no effect whatsoever on the foreman; that applies to the engine.

Mr. Black: That's all, you may cross-examine.

Recross-examination.

By Mr. McCarthy:

Q. Just a moment ago when Mr. Black first asked you that question, Mr.—your answer was "no," was it not?

[fol. 41] A. To what? I don't know what question you are referring to.

Mr. McCarthy: Will the reporter please read the question Mr. Black first asked to which objection was made? Will you read it, Miss Reporter?

(Reporter reads from the record.)

Q. The first time that question was read to you, your answer was "no," was it not?

A. Well, could I please—

Q. Just answer my question; the first—

A. I do not know, sir.

Q. You don't know whether your first answer was "no," or not?

A. I do not know, sir, whether my first answer was "no."

Mr. McCarthy: I think that's all.

CLYDE WILKERSON, the plaintiff herein, called as a witness to testify in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Wilkerson, you may state your full name, please.
A. Clyde Wilkerson.

Q. Now, Mr. Wilkerson, I want you to speak so all the ladies and gentlemen in the box can hear everything you say. You take care of that?

A. Yes, sir.

Q. Where do you live?

A. 3635 West Tenth Avenue, Denver, Colorado.

Q. And how old are you at this time, Mr. —

A. 61.

Q. At the time you were injured, how old were you?

A. 60.

[fol. 42] Q. You are presently employed by the defendants in this case, are you not?

A. Yes, sir.

Q. As a switchman in yard service in Denver?

A. Yes, sir.

Q. How long have you worked for the company?

A. 12th day of this month will make me even thirty years.

Q. That is, you had experience in train service, yard service, before that?

A. Yes, sir.

Q. How long?

A. About eight years previous to the—six to eight years.

Q. Where did you work?

A. Santa Fe, Union Pacific, Colorado Midland.

Q. You spent your lifetime—your mature lifetime—in railroad service?

A. Yes, sir.

Q. I call your attention to the 26th day of July, 1945, will ask you if you were working at your job on that day?

A. I was.

Q. And what job were you holding at that time?

A. Engine foreman.

Q. I want you to tell the jury what the duties of the engine foreman are.

A. Have charge of the crew that is doing the work that is assigned to that engine at the present time.

Q. Now, tell the jury how many men were in your crew that day, and what each of them were doing.

A. I have two helpers with me and an engineer and fireman on the engine consisting of five-man crew.

[fol. 43] Q. And, in a general way, what was the nature of the work you were doing in the yards at Denver that day?

A. General passenger switching.

Q. You were in the coach yard, were you?

A. Yes, sir, making up passenger train, doing general passenger work.

Q. Your shift was from the beginning time of what, seven in the morning?

A. Seven A. M. to three P. M.

Q. How long had you been holding down that day shift?

A. About something like six years.

Q. Your seniority was sufficient so you could hold the day shift?

A. Yes, sir.

Q. During that six years, had you worked in the coach yards in Denver?

A. Practically every day.

Q. I understand the wheel pit that has been spoken of in the court this morning is in the coach yard at Denver?

A. Yes, sir.

Q. By the way, I don't believe you have fully described to the jury what the duties of the engine foreman consist of; just what are you required to do in your job as engine foreman?

A. I am giving instructions what work they want done, and I have to go and see that the work is arranged so that I can get to it to do it.

Q. Is the engine crew work under your direction?

A. Yes, sir.

Q. And the other members of your crew likewise, I suppose?

[fol. 44] A. Yes, sir.

Q. Now, Mr. Wilkerson, I take it that you have examined Exhibit 2, have you not?

A. I looked at it for a couple of minutes, yes, sir.

Q. Would you say that it contains an accurate reproduction, miniature reproduction, of the wheel pit and the tracks that are used there?

Q. Yes, sir, to a certain extent.

Q. Well, to what extent would you take exception with the accuracy of the reproduction, if any?

A. The pit where those two bottom rails are that the jack runs on in the bottom of the pit between your two rails is something like three feet deeper than those two rails there.

Q. In other words, the two rails are two rails that appear here in the bottom of the pit?

A. Yes, sir.

Q. You say your best judgment from the top of the rail to the—

A. Top of that rail down to the bottom of the pit, I should judge, is about three feet.

Q. I want you to tell the jury, if you know, as near as you can, how that jack operates that runs the rails in the bottom of the pit.

A. It is operated by—raised up and down by compressed air. It is operated on the rail sideways by electric motor.

Q. That is, if it moves to the east or the west along the rails, the power is furnished by electric motor?

A. Yes, sir.

Q. But the lifting motion—

A. Yes, sir.

[fol. 45] Q. —is furnished by the power of compressed air, is that right?

A. Yes, sir, hydraulic jack.

Q. Hydraulic jack. Now, Mr. Wilkerson, I will ask you to describe, if you will, for the jury, how the tracks that cross the pit underneath—that is, at 23½—how are they handled, those tracks that are just immediately over the pit?

A. Well, it's a short piece of rail on each side made into a square, so that it will stay at a certain gauge at all times, and, when the jack comes up under it, it lifts that up enough so as to take the weight of the wheel and the rail; then they release the rails on each end, on each side, then lower the jack wheel and all into the pit so it can be moved to the sideways to be taken from the pit.

Q. So, then, the wheels are lowered into the pit by the manipulation of that track, is that right?

A. Yes, sir.

Q. I take it you never worked as a railroad repairman in the yards, Mr.—

A. No, sir.

Q. From the testimony, I assume you were working in the yards when these—this wheel pit was constructed?

A. Yes, sir.

Q. Can you tell the jury, and I suppose they can figure it out—may get the evidence later—approximately how wide that is from side to side, this wheel pit is?

A. Oh, I would say it is nearly four feet. I don't know the exact measurement.

Q. Nearly four feet wide?

A. Yes, sir.

Q. About how deep is it?

[fol. 46] A. I was told it is eleven foot, four inches to the top of the jack rail in the bottom.

Q. Would that be eleven feet from the top of the rail or eleven feet from the bottom of the pit?

A. Eleven feet from the top of the pit to the top of the pit that the jack rail operates on.

Q. From there to the bottom of the pit, you say, is about three feet?

A. Three or three and a half feet, something like that.

Q. The side walls of the pit, I understand, are cement?

A. Concrete wall.

Q. The bottom, down below the jack rail, that is cement, too, I assume?

A. Yes, sir.

Q. Now, Mr. Wilkerson, I now call your attention to the time that you went to work here in the morning that you were injured, will ask you if at that time you received any direction with reference to placing any car over the wheel pit on track 23½?

A. I did.

Q. Will you tell the jury what directions you received and from whom?

A. I was instructed to spot a car on 23½, to change out a pair of wheels and the south truck of the wheel was marked.

Q. Did you comply with that instruction?

A. I did.

Q. What kind of car was it?

A. It was a tourist car, if I remember correctly, tourist sleeper.

Q. Tourist sleeper?

A. Yes, sir.

[fol. 47] Q. Would that be similar to the car, the likeness of which appears here in the miniature?

A. Yes, sir.

Q. Which trucks did you place over the wheel pit?

A. South truck, and I was under the impression, as I spotted the inside pair of wheels, I am not—

Q. Tell the jury—come down tell the jury what you mean by "inside pair of wheels," what you mean by "trucks?" Take this and show on miniature if you can so understand this. First describe the trucks to them, and tell what you mean by the inside and outside trucks.

A. The truck here has three pair of wheels and each wheel operates separately. This is what we call the inside pair, or the pair next to the center. Center wheel in the truck is as that car is spotted there at the present time, outside pair of wheels would be the outside pair of wheels in that particular truck on that end of the car.

Q. Well, then, so that we will see if I understand it. Then the inside trucks, inside pair of wheels of the front trucks would be the wheels near to the center of the car?

A. Yes, sir.

Q. Now, the center trucks would be the pair between the inside and the outside?

A. Center wheels.

Q. Center wheel would be between—

A. Would be the center wheel of that particular truck on that—

Q. Then, of course, the outside would be the one near the front part of the car?

A. Yes, sir.

Q. Now, what was your memory with respect to the wheel that you placed over the wheel pit?

[fol. 48] A. I was under the impression that I spotted what we call inside pair of wheels of that particular truck; now, I wouldn't swear to that being exactly correct. I may be wrong.

Q. Now, will you tell the jury again which pair of wheels now appear over the wheel pit?

A. The center wheel of that particular truck is spotted over the pit at the present time in that miniature.

Q. So that if they wanted to remove that center wheel, then, by this jack that works on the track, that jack had come up against the wheel when the wheel was taken off, it would

be lower so that the wheel could be dropped to the bottom of the pit?

A. That's right.

Q. So taken to the shop wherever it was to be taken for repair or removal, whatever it was?

A. Yes, sir.

Q. But your memory now was that the inside wheel was the one you placed over the pit?

A. Yes, I might be wrong on that particular point.

Q. You may take the stand. Will you tell the jury about when it is that you spotted this car over the wheel pit?

A. Something like seven-thirty or eight o'clock, A.M.

Q. Was that the only car there was on 23½ at that time?

A. Yes, sir.

Q. The repair crew car men, were they there at work at that time?

A. Yes, sir.

Q. The crew had already arrived?

A. They were—when I spotted the car, they were on top.

Q. All on top?

A. Yes, sir.

Q. At that time, did you notice the condition of the safety chains?

[fol. 49] A. Yes, sir.

Q. Tell the jury about that; what you observed?

A. They were up.

Q. Safety chains were up?

A. Yes, sir.

Q. What, if anything, did you notice with reference to the covering of the wheel pit west of the car?

A. Well, the covering was all off except one board.

Q. And where was that board with reference to the posts that end—would be the post from the east end there, the east post?

A. Right next to the post with the east edge of the board.

Q. That is, the east edge of the board was up pretty close to the post?

A. Yes, sir.

Q. Then the board would be to the west of the post?

A. Yes, sir.

Q. You may state whether or not at that time you had occasion to pass over the wheel pit—I mean, after the car was spotted?

A. Yes, sir, I did.

Q. Tell the jury about that.

A. I went around the end of the car, and went across behind this chain across this board behind the other post and on over to the steam crossing on the coach yard.

Q. Now, come down to the exhibit and take the pointer and just point out to the jury the route that you took at that time.

A. Well, I spotted the car; I was on the east side of the car giving the signal to the engineer for the exact spot. After cutting away, I told my man following the engine where to come to with the engine over in the other yard. [fol. 50] I went around the end of this car.

Q. Which end, south end?

A. South end, and in between the car and the safety post across this board between the car and the other safety post and on across towards what we call the "steam crossing" in the coach yard.

Q. You were travelling, then, generally north, as I understand the demonstration?

A. That's right.

Q. You passed between the south safety post first?

A. Yes, sir.

Q. Across the board, then, between the car and the safety chain?

A. Yes, sir.

Q. Mr. Wilkerson, I will ask you to state whether or not you have ever observed other switchmen or workmen working in the yards there in passing over that pit while cars were standing off $23\frac{1}{2}$ since the safety chains were up?

A. Yes, sir, I have.

Q. What has that practice been, the practice of crossing over the pit?

A. Men that work around there, regardless of whether switchmen or car men that wanted to go that way went through there.

Q. Went through—you mean over the pit?

A. Over that pit, as I just described, from either side.

Q. Do you recall—and I am not speaking of a definite time or dates—do you recall when the safety chains were installed there and the posts?

A. No, sir, I can't recall just when they were installed, [fol. 51] but they were something like six or eight months previous to this accident.

Q. But I mean, not requiring definite answer as to time, you do recall when they were installed?

A. Yes, sir.

Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

A. Walked right straight across the board.

Q. Was there a board usually there to walk over?

A. Yes, sir.

Q. Was there any change in that practice after the chains were installed?

A. None, only they had to walk around the chains.

Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit?

A. No, sir.

Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

A. Yes, sir.

Q. What did you observe with reference to the number of times the occasions when men would cross over the pit.

A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary, pullman, employees and so forth.

Q. Crossed over the pit?

A. Yes, sir, it was a common practice for everybody to use that that way.

Q. Mr. Wilkerson, I again direct your attention to the [fol. 52] time there after the time when the safety chains were installed, will ask you if you ever saw a time or ever remember making any observation of an occasion when the chains were up and men were working, when there wasn't a board over the pit near to and perhaps slightly to the west of the posts?

A. I don't remember whether I ever noticed that for sure or not, Mr. Black.

Q. Well, did you—was the board usually there?

A. Most generally there, yes, sir.

Q. What use of that board did you observe being made?

A. Just to walk across.

Q. Did you ever see—did you ever notice the board ever being used for any other purpose except men walking across?

A. No, sir, I haven't.

Q. Ask you to state whether or not you experience any difficulty in passing between the car and the post and onto the board and over the board and between the car and the north post at the time you passed it, the first time in the morning?

A. No.

Q. When you first crossed over that board on the morning of July the 26th, day you were hurt, did you make any observations of the condition of the board?

A. I did.

Q. What did you see?

A. I saw grease on the board at that time.

Q. Was grease on the board at that time?

A. Yes, sir.

Q. Tell the jury, if you will please, about how wide that board was.

A. Well, it's something like 18 or 20 inches wide.

[fol. 53] Q. Never had occasion to measure it?

A. I never measured it at all, no, sir.

Q. Eighteen or twenty inches wide?

A. Yes, sir.

Q. Now, Mr. Wilkerson, I will ask you to state whether or not you had occasion to pass over the board again that morning before you were hurt?

A. Not until I was—at the time I was hurt.

Q. Not until the time you were hurt?

A. No, sir.

Q. I want you now to tell the jury in your own words just exactly what you were doing there at the time that you were injured; where had you been and what had been the nature of the work immediately before you were hurt?

A. We were working in the south end of the coach yard and shoved in on track 24 and spottéd two private cars, if I remember correctly, to the steam plug at the steam crossing, and I give the—instructed my helper to cut the engine off and back the engine away about a car length or car and a half or two cars away from this car, so that the blue flag—could erect his blue flag for protection of the other employees on the track; then I went to what we call the battery house—

Q. Will you stop there just a minute and will you kindly come over here to Exhibit 1?

Mr. McCarthy: I think we have marked that exhibit—

Mr. Black: I might make a preliminary statement; the map has been, or will be, marked, I guess, Defendant's Exhibit 1, furnished by the defendant.

Mr. McCarthy: Yes, that last part of your statement is correct, but I think we already had a Defendant's Exhibit 1, consisting of a photograph at the time you took the deposition. I think—let's call it three, Defendant's Exhibit 3.

[fol. 54] The Court: All right.

Mr. Black: Having in mind, if the Court please, that the map will be marked as Exhibit 3 and the statement that was prepared by the engineering department of the defendant brought here for purposes of this trial, we now offer in evidence—

Mr. McCarthy: No objection.

The Court: All right, it may be received.

By Mr. Black:

Q. Mr. Wilkerson, I call your attention here to a small rectangular drawing that appears on the map and in red it says—no, in blue it says, "wheel drop pit," that is about where the wheel drop pit is located, is it not?

A. Yes, sir.

Q. Various tracks indicated?

A. Yes.

Q. You said just before the accident occurred, you had been in some building for a drink of water, did you not?

A. Yes, sir.

Q. Which building was it?

A. What we call the "battery shop," this one right here.

Q. And the battery—it says, "Battery house" there?

A. That is it.

Q. And the number is 124. May the record indicate that that is the building that he indicated, and it appears that the Battery House is some distance to the north of the wheel pit?

A. Yes, sir.

Q. I see; you may take the stand. And about what time of day was it, Mr. Wilkerson, when you were in the Battery House for the drink?

A. Oh, about 10.25 A. M.

Q. Now, after you left the Battery House, pick up your story and tell the jury what happened, please.

A. On coming out of the Battery House, I came out on the west side of the Battery House next to Track 24, came out [fol. 55] and walked around end of wheel track over next to track 23½. I walked up the west side of the tourist car, expecting to find the man in charge of the drop-pit, who is Mr. Hawkins, working on that side of the pit.

Q. Which side?

A. On the west side of the car. On reaching the pit, I found he wasn't on the west side, but from the sound of his voice talking to his helper, I took it he was just on the east side of the car in the pit with his helper. I started coming around the chain, put my right hand on the top of the post, came around the chain and turned around and started to cross the cover board, putting my right foot on the cover board. As I did so, this board felt to me like there was a little rock or gravel which caused it to tip under the weight of my foot, starting my foot to slide and away I went to the bottom of the pit. As I went down, I hit my right hand right through this joint, on the concrete wall with all my weight. I endeavored to catch myself in this manner as I went down into the pit, but when I reached the length of my arm, the hands slipped off, and I lit with my right foot across this south rail in that pit, spraining my ankle, and I fell backwards across the other rail with my ribs down into the lower part of the pit, breaking what I thought at the time was two ribs, but on later examination, the doctor tells me the x-ray shows I broke three ribs.

Q. Were there any men working in the pit at that time?

A. Mr. Hawkins and his helper were on the opposite side of the car. Well, Mr. Hawkins, I discovered, was underneath of the car on a board under there, adjusting some brake levers; his helper was on the south side of the car.

Q. Now, what happened after the fall had occurred? [fol. 56] A. Mr. Johnson came running over there shortly. By that time I had gone in—pulled myself into kind of a sitting position. He wanted to help me out. I says, "Leave me sit for a few minutes until I kinda get my breath; maybe I can come out by my own—by myself," which I later did.

Q. Later you were out of the pit with your own hands?

A. Yes, sir.

Q. One question: What did you want to see Mr. Hawkins about?

A. I went to find Mr. Hawkins to see if he was through with this particular car so the car could be moved and I could go get another bad-order car that I knew they were in a hurry for and spot it for him, so he could get the other car done for our noon—for a two o'clock train, I believe it was wanted for.

Q. Did you then have in your possession orders pertaining to the repair of this second car?

A. Yes, sir, I had been instructed that morning in regard to it.

Q. Was the blue flag up, do you remember, at the time you went hunting for him?

A. Yes, sir.

Q. Had you received any information at that time as to when the repair work on this tourist car would be completed?

A. I hadn't received no information, no, sir, only that by observation I noticed that the wheel was in, and I knew that he was getting pretty near done with the car, would be in a few minutes if he wasn't already finishing up.

Q. The wheel had been installed, you observed that?

A. Yes, sir.

Q. That was on the west side?

A. Yes, sir.

[fol. 57] Q. Now, after you got out of the wheel pit, just tell the jury what happened to you, where you were taken?

A. Well, I stood around for a few minutes and kinda getting my breath and getting straightened out a little bit, see how I was going to feel. I was then taken over to the, what we call the "emergency hospital," which is about 300 feet or 350 feet there from where this pit is located to the company doctor, and, on examination, he found I had these broken ribs. He treated me at that time.

(Testimony as to damages omitted.)

Mr. Black: You may cross-examine.

Cross-examination.

By Mr. McCarthy:

Q. As I understood you to say that your ribs are all right now, is that correct? Your ribs are all right now?

A. They are at the present time, yes, sir, other than as a show of lumps where the breaks were.

Q. Cause you no pain?

A. No, no pain.

Q. Your right ankle is all right?

A. Yes, sir.

Q. Now, let me go back; let me go back here to the time when you went to the Battery House to get a drink of water, and, after you got a drink of water, I believe you stated that you came out of the Battery House on the west hand side?

A. West side.

Q. West side of the Battery House. And you could see at that time that the car men were nearly completed with the work on the car that was spotted over the wheel pit?

A. Yes, sir.

Q. Is that right? You couldn't see them on the west side of the car, could you?

A. No, sir, I didn't see them.

[fol. 58] Q. So that you knew that they were somewhere other than the west side of the car?

A. I expected to find them working in the pit just under the—

Q. Just under the car?

A. Just under the car on the west side.

Q. And you could see by observation when you were up here at the Battery House that they were nearly through with their work?

A. Yes, sir.

Q. Furthermore, you knew, of course, that there was a blue flag?

A. Yes, sir.

Q. On the track, and that blue flag, of course, is placed there by the men that work on the car?

A. Yes, sir.

Q. And you knew when the men were through with their work on the car that they, and they only, would move the blue flag?

A. Yes, sir.

Q. Removal of that blue flag would be a signal that they were through with their work on the car?

A. Yes.

Q. When the blue flag was moved, you could come in, get the car off the pit?

A. Yes, sir.

Q. When you were up here on the west side of the Battery House, you knew also that—from your observation, that the pit was open and that the men were working on the pit?

A. Yes, sir.

Q. And that the safety chains were up on three sides of the pit?

A. Yes, sir.

[fol. 59] Q. And that was before you ever—you knew all those facts before you ever began to go down towards the pit?

A. Yes, sir.

Q. Now, you stated you wanted some additional information?

A. Yes, sir.

Q. From the men that were in the pit about when you could move the car?

A. Yes, sir.

Q. So, in order to get that information, you decided that you would go down in the direction of the pit, is that correct?

A. Yes, sir.

Q. And you decided you would go from the Battery House which was—we will refer to this Defendant's Exhibit 3; you were up here at the Battery House, and that is—oh, would you estimate that is 150 yards probably from the wheel pit?

A. Something like that; I don't know what the exact distance is.

Q. Well, it is considerable distance?

A. Considerable distance, yes.

Q. But still you could see if any men were down along the west side of the pit?

A. Yes, sir.

Q. And you walked down, you said, between the wheel track—this track here, and track 23½?

A. Yes, sir.

Q. And as you were on your way down, did you see Mr. Hawkins?

A. I did not.

Q. One of the pit men?

A. I did not.

[fol. 60] Q. Would you remember if you had seen him?

A. Yes, sir.

Q. And when you got right to this point on the pit at the north—on the north side of the pit and the west side of the car on track 23½, you stated that you could hear the men talking under the car?

A. Yes, sir.

Q. And did you ask them at that time for the information that you desired?

A. No, sir, I did not.

Q. You could have asked them?

A. I could have.

Q. And at that point, what did you decide that you would do?

A. I just—from my direction of the voices, I took it they were on the other side of the car.

Q. Took it they were over on the east side of the pit?

A. East side of the car.

Q. You couldn't see them under there until you got there?

A. No, sir.

Q. But you could hear them talking?

A. Yes, sir.

Q. Now, when you were up here at the Battery House and you knew that the men were down in the pit, you could have decided, could you not, to have gone around the north end of this car and down on the east side of the car that is on track 23½?

A. I could have, yes, sir.

Q. No one told you you had to go down on the west side of the car?

A. No, sir.

Q. You had no orders or instructions to that effect?

A. I had no orders, no, sir, but I wanted to talk—

[fol. 61] Q. The—go ahead.

A. I wanted to get the information from Mr. Hawkins that I wanted and he works on the west side of the car.

Q. You wanted to get this information, so you went down to the pit to get it?

A. Yes, sir, went to the place he usually worked.

Q. But you could have gone around the north end of the car on track 23½ and down on the east side of the car?

A. Yes, sir.

Q. And when you were at this point and after you had heard them talking, you could have gone around the west end of the pit, of the wheel pit, outside of the chains and around the south end of the car, then onto the east side, could you not?

A. Yes, sir; I could have.

Q. Now, when you went through this space that you say—you state you did, between the chain post and the car, you have never measured that distance between there, have you?

A. No, sir.

Q. Was it necessary for you to turn sideways?

A. It was.

Q. And what position was your body facing?

A. Facing the west.

Q. Did you take hold of the chain post?

A. I did.

Q. And then did you have to go a short distance westward in order to get onto the crossing board?

A. No, sir, I don't think I went west over six or eight inches; just went around the post, turned around and stepped onto the board with my right foot.

Q. You stepped onto the board with your right foot?

A. Yes, sir.

[fol. 62] Q. What is your recollection, Mr. Wilkerson, as to the distance of the east edge of this crossing board from the chain post?

A. As near as I can recall, it was within four or five inches of a direct line with the two posts.

Q. So that the east edge of the crossing board, you say, was four or five inches?

A. As near as I can recollect, yes, sir.

Q. You recall the deposition which you gave under oath over at Denver?

A. Yes, sir.

Q. On page 21 of the deposition, did I ask you this question, referring to this same board:

"Where was that located with reference to track 23½?"

"A. It was about something like forty or forty-eight inches from the rail. That's from the west rail."

A. Yes, sir.

Q. "Q. About forty to forty-eight inches from the west rail over track 23½?"

A. Yes, sir.

Q. Did you so testify?

A. Yes, sir.

Q. Was it true?

A. As far as I know, it was.

Q. Did you also testify:

"Q. What was the position of the east edge of that cover board with reference to the safety chain post next to the track?

"A. It was setting back about two feet."

Did you so testify?

A. I don't think I testified to that fact at all.

Q. You didn't testify to it?

[fol. 63] A. I don't think I did.

Q. It isn't true?

A. No, sir.

Q. You realize, of course, that at that time you were taking an oath?

A. Yes, sir.

Q. And you deny that you did state that the board was setting back, the east edge of the—

A. I don't think the board was back that far.

Q. You didn't so state at that time?

A. No, sir.

Q. At that time, did you also testify as follows:

"Q. That is the east edge?

"A. Yes, sir.

"Q. So that the east edge of the cover board was about two feet west of the safety chain post?

"A. Yes, sir; of course that measurement is just a guess.

"Q. I understand that it is just your estimate.

"A. That is my best estimate, yes, sir."

Did you so testify at the time you gave this deposition in Denver?

A. As near as I can recollect, the board was back about ten or twelve inches, or something like that, or I guessed at that.

Q. Then a moment ago you said four or five inches; now you say ten or twelve inches?

A. It was back a little ways behind the post; I don't know just how far.

Q. Did you so testify at the time you took—or at the time this deposition was taken, that the east edge of the board [fol. 64] was two feet west of the safety chain post?

A. I don't remember of testifying to that fact.

Q. Mr. Wilkerson, as I recall your testimony, when Mr. Black was examining you, you said that when you spotted this car on the pit, that you gave your instructions from the east side over on this side of the car, the east side of it?

A. East side of the car, yes, sir.

Q. And at that time, the pit at this place was covered up?

A. Yes, sir.

Q. On the east side, the cover boards were on the pit?

A. Yes, sir.

Q. And you were aware of that fact, then, when you were up in the Battery House and before you decided to go down to the pit, you were aware, of course, that there was no obstruction on the east of this car, and I think you testified you could have gone down here, is that correct?

A. Well, those men working on that car, it would be necessary for them to remove them boards on the east side of that car to do that work.

Q. Oh, I misunderstood your testimony, then. Then this pit would be open on this side?

A. The pit was closed when I spotted the car, but when the men were at work on the car, the pit would have to be open.

Q. Then the pit was open on the east side?

A. Yes, sir.

Q. And when the—when men are working on the car, is the pit usually open on the east side?

A. The pit must be open both sides.

Q. But, nevertheless, you still could have gone down around the north end of the car!

[fol. 65] A. Yes, sir.

Q. And to the north edge of the pit on the east side, and secured the information you needed?

A. Yes, sir.

Q. And there was no obstructions down to the point of the pit?

A. No, sir.

Q. Which would have prevented your getting there?

A. No, sir.

Q. And there was no obstruction around this edge of the safety—around the west edge of the safety chain, and around the south end of the car to the east side of the car?

A. No, sir.

Q. You could have gone that way.

A. I could have gone that way, yes, sir.

Q. It was your own decision you went down the west side of the car?

A. Went down expecting to find Mr. Hawkins on that side of the car, man I wanted to confer with.

Q. You could see when you were up at the Battery House he wasn't on the west side?

A. No, I couldn't see that because I expected to find him working just under the edge of the pit, under the car there on that side.

Q. I believe in your statement a few moments ago you said that when you started to cross this board, it felt like there was a pebble or a rock?

A. Yes, sir.

Q. Did you see a pebble or a rock?

A. I did not; I didn't examine it.

[fol. 66] Q. So that you were just—that's just a guess?

A. That is a guess, yes, sir.

Q. Where was that—where did it seem like that rock was on the edge of the board—

A. On the—

Q. Or on the board?

A. Under the board.

Q. You didn't examine the board?

A. No, sir.

Q. And it only seemed like it?

A. The board felt to me like it give, like there would be a pebble under there, enough to start my foot to slipping.

Q. You are just guessing whether or not there was one?

A. Yes, sir.

Mr. McCarthy: I think that's all.

Mr. Black: That's all, thanks.

The Court: I would like to ask this question: he said the pit had to be uncovered; I take it that was for the purpose of light. Is that it or some other reason?

Mr. Black: I will ask about that, your Honor.

Mr. McCarthy: He hasn't testified as to that fact.

The Court: I don't know.

Mr. McCarthy: I understood him to say the pit had to be opened so the men could work on it; that was my understanding.

The Court: I wondered why; I just wanted an explanation. He said it had to be open on both sides.

(Discussion.)

A Juror: Your Honor, I would like to have it determined on which side of the board he fell, towards the car or on the other side?

The Court: Mr. Black, you may—

[fol. 67] Redirect examination.

By Mr. Black:

Q. Mr. Wilkerson, will you describe your fall completely and clearly to the jury and tell them which side of the board you fell from, the east or the west side?

A. As I stated before, came in this way, with my right hand on the post; stepped in here, stepped onto the board with my right foot and my foot slipped enough to throw me off balance, and I went down to the west of the board into the pit.

Q. Where did you hit your hand?

A. Hit my hand on the top of the concrete wall, right about in there, right close to the edge of the board as I went down.

Q. Record may show that the witness indicates the place in the south wall of the pit at the top; that is, the top of the south wall, just to the west of the board.

A Juror: May I ask a question? Is that board stationary, or can it be removed?

Mr. Black: Address your question to his Honor.

By Mr. Black:

Q. Mr. Wilkerson, will you describe to the jury just how that board is made and how it is placed over the opening leading down into the pit?

A. This board consists of two or three pieces of lumber bolted together on—with a piece of angle iron at each end.

That board is movable. That board there can be moved clear over to this end if they want to move it over there. It isn't stationary in there at all. It can be removed at any time they wish to move it.

The Court: You have the boards here in the courtroom?

Mr. Bagley: Yes, your Honor.

Mr. Black: That is all right; let's have the board, then.

[fol. 68] Mr. Bagley: Perhaps we better have this marked as Defendant's Exhibit 4.

Mr. Black: Agreeable, your Honor.

The Court: You may refer to it as such.

By Mr. Black:

Q. Now, Mr. Wilkerson, the board here that is displayed to the jury has been identified as Defendant's Exhibit 4, I will ask you to examine it and tell the jury if that was the board that was across the pit at the time you fell?

A. It looks like it, yes. Looks like same one I fell off. I don't know whether at this time it is—it may have been changed with some other board.

Q. Boards are interchangeable?

A. Yes, boards are interchangeable.

Q. But as far as its appearance, it looks like that board?

A. Yes, sir, it is a similar board to that.

Q. You may take the stand.

Mr. Black: Your Honor, I desire to remove this part from the deposition of Mr. Wilkerson and offer it here as an independent exhibit.

Mr. Bagley: We have no objection to that. I think the photograph is already marked as Defendant's Exhibit 1.

The Court: That's the one you have heretofore referred to?

Mr. Bagley: Yes.

(Discussion.)

The Court: Go right ahead with your examination.

Q. Mr. Wilkerson, I show you here this photograph that was made a part of your deposition, will ask you if this is a fair likeness of the pit, the wheel pit as it existed at the time you were injured?

A. Yes, sir.

Q. Now, the chains—what about the chains; are they about [fol. 69] the condition they were then or is there some difference?

A. The chains at the time were down within about a foot of this rail across this wheel track. They were sagged away down—those chains have been shortened and tightened up, after I got hurt, before this was taken.

Q. Safety posts upon which chains are attached are in the same place, same condition, are they not?

A. Yes, sir.

Q. I call your attention to the board that extends across the pit just to the west of the posts, is the board in about the same position it was when you fell?

A. Yes, sir, about that.

Q. You say about that same position?

A. About that same position.

Q. As near as you now recall?

A. As near as I now recall.

Q. When you went into the pit, you may state whether or not the board came in also, or did it remain in place?

A. The board remained in place.

Q. You stated there was another board across the pit immediately to the west of the rail; I call your attention to the board that appears in the photograph immediately to the west of the rail; is that about the same width of board and same kind of board?

A. About the same, yes, sir.

Q. I call your attention to the space between the two boards—that is, one immediately to the west of the rail, and one you were walking over when you were hurt; is that space about the same?

A. About the same, yes, sir.

[fol. 70] Q. Picture fairly shows—

A. Fairly shows about the same conditions.

Mr. Black: Now, your Honor, we desire to offer the exhibit in evidence.

The Court: Been received.

Mr. Black: If has been received! Haven't even offered it.

Mr. McCarthy: We haven't any objection.

The Court: I think you will find I stated in the record when you began the examination it was received.

Mr. Black: There can't be any question it is in the record at this time, and we will take it out and make it a part of the examination of Mr. —

(Discussion.)

Mr. Black: That is all thanks. You may cross-examine.

Recross examination.

By Mr. McCarthy:

Q. The other board you just referred to in the photograph is shown on this model as the board right next to the rail on 23½?

A. Yes, sir.

Q. And the overhang of the car completely covers up that board?

A. Yes, sir.

Q. That is not the board you used?

A. No, sir.

Q. Or the board from which you fell?

A. At the time I made my statement to the claim department, I was under the impression that that was the board I fell from.

Q. But you subsequently—

A. But I said on later examination—

[fol. 71] Q. You went back—

A. I went back and found that the board next to the rail would not fit outside; therefore, that board would only fit in that one particular spot.

Q. And that was completely covered up by the overhang of the car?

A. That was completely covered with the overhang of the car.

Q. One other question: you were referring to the fact in that photograph that the chain was slumped down—

A. Yes, sir.

Q. —somewhat more than is shown in that photograph?

A. Yes, sir.

Q. Did you ever go over or under that chain?

A. I did not, at no time.

Q. Board was located west of the chain post, was it not?

A. Yes, sir.

Q. And it would have been much quicker for you to go over or under the chain?

A. Chain was too high at the post to go over, have to crawl under.

Q. Why didn't you go over it or under it?

A. Because I didn't want to.

Q. Is that the only answer you can give?

A. It wasn't necessary for me to go over the chain.

Mr. McCarthy: That's all.

Mr. Black: I just want to recall Mr. Wilkerson, your Honor, for a question.

The Court: All right.

Whereupon, CLYDE WILKERSON, having previously been duly sworn, was recalled to the witness stand for further examination.

[fol. 72] Further redirect examination.

By Mr. Black:

Q. I believe you testified heretofore that you held the day job in the yards at the time these chains—the posts were installed?

A. Yes, sir.

Q. You may state whether or not you held that job continuously from the time they were installed up until the time you were injured?

A. Yes, sir.

Q. During that period of time, did you ever remember of any single day when you—when switchmen and other men didn't cross over the pit as you indicated you did?

A. Yes.

Mr. McCarthy: I object—

A. I don't remember one time that they didn't.

Mr. McCarthy: —repetitious; gone into that fully.

The Court: I think that subject was covered; maybe not identical question, but the subject. He has already answered.

Mr. McCarthy: I move the answer be stricken.

The Court: Motion denied.

Mr. Black: We rest, your Honor.

The Court: You may proceed.

(Mr. McCarthy makes opening statement to the jury.)

Mr. McCarthy: I would like to call Mr. Elledge.

EVERETTE WILLIAM ELLEDGE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCarthy:

Q. Mr. Elledge, will you state your name and address?

A. Everette William Elledge, 2401 Grove Street, Denver, Colorado.

[fol. 73] The Court: I wouldn't be able to spell your name.

A. E-l-l-e-d-g-e.

The Court: What is your full name?

A. Everette William Elledge.

Q. You are an employee of the Rio Grande railroad?

A. Yes, sir.

Q. Will you state your position with the railroad?

A. I am general car foreman at Denver, Colorado.

Q. Raise your voice little bit. How many years have you held that position?

A. At Denver, I have been general car foreman four years.

Q. And you have had considerable car experience before that time?

A. Yes, sir, all my life.

Q. You have been in railroad business all your life, and does the—as part of your duties as car foreman at the Burnham yards in Denver, you have charge of the work that is done on the wheel pit at Denver?

A. Yes.

Q. And the cars that are repaired on this wheel pit?

A. Yes, sir.

Q. And you say you held that position for a number of years and are familiar with the facts and circumstances surrounding that pit?

A. Yes, sir.

Q. Now, Mr. Elledge, let me call your attention to the date of July 26, 1945, which that date it is agreed that Mr. Wilkerson received some injuries on that day in a fall in the wheel pit. Now, did you have occasion to go to the vicinity of that wheel pit at about that time?

A. Yes, sir.

[fol. 74] Q. Will you state the circumstances and when it was?

A. Well, it was about 10:30 A.M. in the morning that I understand that he dropped in the pit, but I was something like fifteen to twenty minutes later before I received notice. I went to the pit immediately after the injury.

Q. About fifteen or twenty minutes after you state he was injured, you arrived at the pit?

A. Yes, sir.

Q. And at that time was Mr. Wilkerson there?

A. No, sir.

Q. He had left. Were there present at that time men who were working on the pit?

A. Yes, sir.

Q. And who you understood had been working on the pit at about the time Mr. Wilkerson was hurt?

A. Yes, sir.

Q. And at that time did you make any inquiry as to whether or not the physical conditions existing at that time were the same as when Mr. Wilkerson was injured?

A. I did.

Q. At that time did you make an investigation of the physical conditions at the pit?

A. I did.

Q. And will you state to the court and to the jury just what the situation was with reference to the safety chain posts and safety chains?

A. At the time I made this check of the pit, safety chains were in position; the pit was open for work.

Q. And what was the situation with reference to the cover boards over the pit?

A. There was one board west of the chain posts was the only one that was in there at that time.

Q. One board west of the chain post?

[fol. 75] A. That's right.

Q. And shortly thereafter, Mr. Elledge, did you have occasion to make measurements of the pit and the physical objects at the pit?

A. Yes, the next day I made measurements of the complete pit.

Q. And at that time, were these objects—referring particularly to the boards and the safety chains, were they in the same position as when you were there the day before?

A. They were.

Q. At the time you made these measurements, Mr. Elledge, how far was the cover board—the east edge of the cover board—from these safety chain posts?

A. Nine and a half inches.

Q. Nine and a half inches?

A. Yes, sir.

Q. And how far were the safety chain posts from the west rail of track 23½?

A. Three foot.

Q. Three feet?

A. Yes, sir.

Q. And so that—three feet from the rail to the post and nine and a half inches from the post to the east edge of the cover board?

A. That's right.

Q. And how wide is that cover board?

A. Twenty-two inches.

Q. Twenty-two inches. And I show you, Mr. Elledge, what has been marked for identification as Defendant's Exhibit 4, I believe, and ask you if you can identify that?

A. It's the same board that was there on the day that—
[fol. 76] Q. Is that the same cover board that was across the pit just west of the safety chain posts?

A. Yes, sir.

Q. And this is the same board you have just referred to as twenty-two inches wide?

A. Yes, sir.

Q. And how wide is this pit, this wheel pit?

A. Four foot, two and a half inches.

Q. Four foot, two and a half inches from inside of the—from one edge of the pit to the other inside edge?

A. That's right.

Q. And describe, if you will, just how this board fits over the pit.

A. This board is placed in position—fits firm when placed in there, be position where it always stays.

Q. Will you describe how these edges are constructed and how they fit?

A. The lip that holds the board in place is made of Z-iron, and it is secured with a strap over the top and holds it.

Q. Is this what you refer to as the Z-iron?

A. Yes, sir.

Q. Shape of "Z"; with a strip of iron along the bottom with bolts and—

A. Yes, sir.

Q. How does this Z-iron fit over the edge of the wheel pit?

A. The lip—the top lip fits over the top of the cement wall to make it almost flush with the top of the ground.

Q. Does this side of the Z-iron fit against the side of the wheel pit?

A. Yes, sir.

Q. Does that fit down tight and snug?

A. Tight.

Q. And the edges of the pit itself, what material are [fol. 77] they made of where the Z-iron rests?

A. Cement, concrete.

Q. And what is this cover board used for in the pit, Mr. Elledge?

A. Well, it's used for cover rather than, when the pit is in operation, but men that work in the pit often use it for crossing.

Q. And do they also use it to do—state whether or not they use it in working on the car?

A. It's not used in working on a car necessarily; it is just a passage from one side of the pit to the other for those that work in the pit.

Q. And is it used to get down—and you may state whether or not it is used to get in the pit and out of the pit?

A. They use it to get down in on the carriage they work in—that is, the drop pit man does.

Q. Does a ladder lead down into the pit?

A. The ladder comes up from underneath on the carriage and they can get on the board, go down in the pit.

Q. And when the pit is not in operation, no car men are working on the pit, then state what the circumstances are with reference to the safety chains and the cover boards.

A. Well, the entire pit is covered with boards similar to this, and the chains are removed so—

Q. And this whole pit is covered with boards?

A. Yes, sir.

Q. Now, what is the usual situation with the pit on the east side?

A. It has cover boards over it, except when the pair of wheels is dropped, it is necessary to move a couple of boards in order—

Q. That would be a couple of the boards next to the car?

A. That's right.

[fol. 78] Q. Now, at the time you made these measurements, Mr. Elledge, did you have occasion to measure the distance between the safety chain post and the side of the car?

A. It's about seven inches right at the edge of the car.

Q. That is from the edge of the car to the safety chain post?

A. It's really five inches at the bottom from parallel with the car, but the post leans slightly out about two inches, I imagine.

Q. So that if the overhang here extends—the overhang of the car is this portion that leans over the rails, is it not?

A. That is it.

Q. Will you state again, Mr. Elledge, the measurements that you made from the safety chain post to the overhang of the car?

A. It was seven inches on that particular car right at the overhang—the post slightly leans out little—it is really five inches at the base when it is parallel with the car.

Q. And on a tourist pullman car, what is the customary overhang?

A. Thirty-one inches.

Q. Thirty-one inches?

A. Yes, sir.

Mr. Bagley: From what?

A. From the rail over—

Q. That's from the rail to the farthest extremity?

A. That's right.

Q. Outside-extremity of the overhang. Now—well, withdraw that. And what kind of equipment is spotted over this pit for repair work?

A. All kinds of passenger equipment.

Q. And there are occasions when passenger equipment with a different overhang than a pullman tourist car is spotted over the pit?

[fol. 79] A. Yes, we have equipment in shorter cars that will have an increase in width of two to six inches, I believe.

Q. So that if an overhang of a standard pullman tourist car was 31 inches—two feet, seven inches—there are cars that come in with a larger overhang?

A. Yes, sir.

Q. Which of course would reduce the measurements that you gave for a standard pullman tourist car—the distances between the safety chain post and the overhang?

A. That's right.

Q. Now, there has been statements—with draw that. At the time of this injury to Mr. Wilkerson in July 26, 1945, you may state whether or not the cars brought in and put over the pit at that time had bad-order cards on them.

A. I don't believe there was any at that time that had bad-order cards on them.

Q. Was there any practice in the yards at that time with reference to bad-order cards?

A. They use chalk in marking all the cars—the inspectors did—and the practice of marking was discontinued something like about two or three months ago.

Q. When were these bad-order cards instituted?

A. Well, I would say about—between two and three months ago.

Q. There was no such thing as a bad-order card on a car in July of 1945?

A. No, sir.

Q. Calling your attention to Defendant's Exhibit 4 that you have identified as a cover board, were you present when that board was removed from the pit?

A. Yes, sir.

Q. When was that, if you recall, approximately?

Mr. Black: Says on the back.

[fol. 80] A. July 8, I believe.

Q. Did you make a marking on the back of the board?

A. Yes, sir, I wrote my name on there and the date.

Q. You written here, "E. W. Elledge, eight dash twelve dash forty-six;" would that be about the time?

A. That would be it because I wrote that myself.

Q. So that this board was in use for a considerable time subsequent to July 26, 1945, from that date, at least, until the date you have marked on the back, is that correct?

A. That's right.

Q. And I will ask you to state whether or not this board, as you see it here today and as you have identified it, is in the same condition as when you examined the board fifteen minutes after Mr. Wilkerson was injured?

A. I would say it was in the same condition.

Q. Now, just one other question about the wheel pit; you

state that when men were working on the car that the cover boards were removed?

A. Yes, sir.

Q. Can you state the necessity for the removal of the cover boards?

A. It's necessary to remove the boards on account of the lowering wheels into the pit and transferring from one track to another; take out bad-order wheels and pick up the new.

Q. And this hoist which operates along rails in the bottom of the wheel pit can be moved up and down?

A. Yes, sir.

Q. Can it not? And the rails and the wheels were dropped down underneath the car and are brought up on another track, are they not?

A. That's right.

Q. Brought over to track—to what is called the "wheel track?"

[fol. 81]. A. Wheel track is right.

Q. And to perform that operation, it is necessary to have the boards removed from the top of the wheel pit?

A. Yes, sir.

Q. By the way, did you measure the depth of this wheel pit?

A. It is ten feet and seven inches.

Mr. Black: What was that answer?

The Court: Ten feet and seven inches.

Q. Is that the depth from the top of the pit to the bottom flooring of the pit?

A. It is extreme depth from the top to the floor.

Q. Ten feet, seven inches?

A. That's right.

Q. Oh, yes, how far from the edge of this wheel pit are these chain posts set back?

A. It's just about 19 inches; the wall is 18 inches.

Q. That is the cement wall?

A. Yes.

Q. Which forms a coping for the pit and the post sets back, you say, about 19 inches?

A. 19 inches, yes, sir.

Q. Did you tell me what the measurements were from of the wheel pit from this safety chain post to the west edge?

A. West edge of the pit or the— *

Q. To the west safety chain, from east safety chain post to west safety chain?

A. It is 16 feet, five and a half inches.

Q. Sixteen feet, five and one half inches?

A. Yes.

Q. What is the distance from the safety chain post at the northwest corner to the safety chain post on the southwest corner?

A. Seven foot, six inches.

Q. Seven foot, six inches?

[fol. 82] The Court: Off the record.

(Discussion.)

Q. Do you know, Mr. Elledge, the distance between the edge of the overhang and the rail, the vertical distance?

A. Well, I believe on that particular car, it is 44 inches.

Q. About 44 inches?

A. 44.

Q. How high are those safety chain posts?

A. 42 inches.

Q. And are the chains around the chains fastened?

A. Forty inches above the ground.

Q. That is two inches below the top of the safety chain post?

A. That's right.

Q. Mr. Elledge, during the time that you have been car foreman in Burnham yards and have had supervision of this wheel pit, you may state whether or not you have at that—during all of that time, ever observed anyone other than car men working on the pit crossing between the safety chain post and a car on 23½ when the pit was open and the chains were up?

A. I have never seen anyone go around back of the posts between the car.

Q. Have you ever seen anyone go over or under the chains?

A. No, sir, I haven't. That is, other than men that's authorized to do work in the pit.

Q. The car men that were working on the pit?

A. That's right.

Q. How frequently are you in the vicinity of this wheel pit when the safety chains are up and the car is on the track?

A. Every day and several times during the day, I might. Some days I might be there once; some might be there a half-a-dozen times during the day.

[fol. 83] - Cross-examination.

By Mr. Black:

Q. Mr. Elledge, did you have anything to do with the preparation of the exhibit here, Exhibit 2?

A. I never made the exhibit, no, or had anything to do with that part.

Q. You didn't participate in the making or construction of the exhibit?

A. No, sir, I didn't.

Q. When was the first time you ever saw it?

A. I believe it was about July the 8th, or so.

Q. Last July?

A. No, this July.

Q. That is what I mean, this July, 1946?

A. That's right.

Q. Now, Mr. Elledge, I notice here from the exhibit that the western portion of the wheel pit is all uncovered with the exception of a board that crosses over it directly to the west, to the west rail, and the board that crosses over it to the west of the post. Does that fairly show the condition of the wheel pit when men are working there?

A. Yes, sir.

Q. So, then, when men are working in the wheel pit, the usual condition of the pit is that it is all uncovered to the west except for the board immediately adjoining the west rail and the board across the pit to the west of the posts?

A. On that question, I might say this, that the board next to the rail isn't always out for different kinds of repairs, but in case of a wheel change, it is necessary that they be removed on account —

[fol. 84] Q. But the board to the west of the post is there continuously?

A. That post is left in place continually.

Q. Never take that board out?

A. No, cases take that board out.

Q. You never remember an occasion when that board was out of place, do you?

A. I have never seen the board out of there.

Q. Reason board is there is so men can cross over it, isn't that true?

A. It is for the purpose of men that work in the pit to use, certainly.

Q. The purpose of that board being left in place is to provide means so men can cross over the pit, isn't that true?

A. That's right, they use it to cross the pit.

Q. The board that is brought here and identified in evidence as Exhibit 4 is the board that was left to cross the pit at that point, isn't that true?

A. That's right.

Q. And you were there when it was removed?

A. I was.

Q. Now, again, I believe you stated this, but I want to have it again before the jury: what was the distance between the west rail and the east edge of the board at the time it was removed?

A. Three feet, nine and a half inches.

Q. That would be $45\frac{1}{2}$ inches, as I figure it, is that right?

A. Yes.

Q. So there was $45\frac{1}{2}$ inches of space between the rail and the board at the time it was taken out?

[fol. 85] A. That's right.

Q. Would you say that would be about the amount of space that was there; that is, between the rail and the board at the time Wilkerson was injured?

A. I'd say that was it.

Q. And that you stated, as I recall your testimony, that the posts are erected three foot outward or three feet to the west of the rail?

A. That's right.

Q. There is a hole, is there not, down in the cement where the posts are put, placed in when they are used?

A. We have a piece of metal tubing that is cemented in the ground that these posts are slipped in.

Q. And the tube is little larger than the posts, I assume, so post slips right down?

A. Large enough so works freely.

Q. Only time posts are there and the chains stand there is when car is on $23\frac{1}{2}$ and men are working there?

A. When making wheel change on $23\frac{1}{2}$.

Q. So that when that shift goes off shift at four o'clock in the afternoon, the work is done; then the rest of the boards

are placed over the pit, the posts are pulled out of their holes, and the chains are taken down?

A. That's right.

Q. And that was the condition—that was the method of doing business when Wilkerson was hurt; that is true?

A. That's right.

Q. You stated that the overhang of an ordinary tourist car is 31' and one-half inches?

A. Thirty-one inches.

Q. Thirty-one inches?

[fol. 86] A. That's right.

Q. Are they all the same; is that standard?

A. That is standard.

Q. And I suppose you speak of that overhang as being the overhang up the body of the car?

A. That's right.

Q. You told the jury that the floor of the car—the floor of the car was what. How high is that?

A. It is forty-four inches above the rail.

Q. Forty-four inches above the rail; the rail is seven inches?

A. Yes, I believe that is seven-inch rail there, I am quite sure.

Q. So, then, the floor would be 51 inches above the ground?

A. That would be about right.

Q. Fifty-one inches above the ground. The post is only 42 inches?

A. That's right.

Q. In height. So, then, the top of the post would be nine inches below the floor of the car when the car was standing on the rail; that is right, isn't it?

A. I believe that's right.

Q. Not any doubt about it, is there? Is that right, about nine inches?

A. Let's say 42; have to figure here.

Q. You said it was 44 inches, the floor of the car was 44 inches above the rail and the rail was seven inches, so seven and 44 is 51, and if the top of the posts—would be nine inches below the floor of the car?

A. That's right.

(Discussion.)

Q. I call your attention now to Exhibit 1, which is the [fol. 87] photograph, and will ask you to state to the jury whether or not that is the fair likeness of the western portion of the wheel pit; it is, isn't it?

A. Yes.

Q. And I call your attention to the board that appears immediately to the west of the post, will ask you if that is where the board, Exhibit 4, was when you removed it, about there?

A. Well, it is about there, where it is supposed to.

Q. I call your attention here to the fact that it appears at the top of the post or considerable distance lower than the floor of the car; is that about right?

A. Should be about nine and a half inches below there.

Q. Underneath the floor of the car, there is a lot of clearance, isn't there, for a man that was going around there?

A. No, there isn't in all the places along here; when trucks or batteries sitting there, couldn't, their springs stick out. You couldn't—

Q. Ask you to state whether or not this is a fair likeness and contains a fair indication of the amount of space between the car and the posts when the car is standing on the track?

A. About right.

Mr. Black: Have the jury examine the picture at this point?

The Court: That is all right.

Q. Mr. Elledge, I will now ask you to state if you know what the overhang of the outside extremity of the journal box is on a tourist pullman?

(Discussion.)

Mr. Black: If we get an answer, we will show the jury where the journal box is.

A. Well, sir, I don't believe I have the exact distance that would be out there, and be accurate on it; I wouldn't be [fol. 88] able to state. See, different types of journal boxes, and they are not all the same.

Q. You understand, do you not, that the car here in the miniature is supposed to be an exact replica—of course on a reduced scale—of the car that was standing there when Mr. Wilkerson was hurt?

A. That's right.

Q. I want you to step down and show the jury what the journal boxes are that I refer to; the journal box that I am interested in stands over the pit. I want you all to see.

A. Journal box along here, one in the middle here, and one here.

Q. Now, it is true, is it not, that the outside extremity of the journal box protrudes outward farther than any other portion of the car until you come up to the floor of the car?

A. Yes, it protrudes out farther than any of the rest until you get—

Q. To the floor?

A. That's right.

Q. I think we agreed the floor of the car there, first part of the floor of the car, was nine inches above the top of the post?

A. I didn't get that.

Q. The floor of the car is nine inches above the top of the post?

A. That's right.

Q. You may take the stand, now, if you please; Mr. Ellidge. Will you state again to the jury just what your duties are down there in the yards?

A. I am general car foreman and I superintend the maintenance of the equipment, freight and passenger.

[fol. 89] Q. So, you have the job of seeing to it that the proper repairs are made on both the freight and the passenger cars?

A. That's right.

Q. Now, you handle thousands of cars a day in those yards, don't you, hundreds of them?

A. Well, we handle hundreds of them, yes.

Q. How many places of repair do you have under your supervision?

A. I have nine departments within the one, yes. I am general foreman of nine departments.

Q. And there are a great many men working in each of those nine departments?

A. That's right.

Q. Do you have supervision of the car inspectors?

A. Yes, sir.

Q. And you have a great number of car inspectors working under you?

A. Yes, sir.

Q. Now, you didn't mean to tell the jury that in your eight-hour-day, you spend any great period of time here in the vicinity of these pits, did you?

A. Well, I tell you, we do have more calls, maybe, to place of that kind, due to the fact that you have certain defects and things shows up—that is, questions of how you handle repairs and that, and I make quite a few different departments, it is very true, and I make them every day.

Q. But when you do make a call here in the wheel pit, you don't usually stay very long, do you? You have competent men there to do the work, and you don't have to stay there long, do you?

A. No, I wouldn't be able to stay there any length of time.

Q. When you are there, you don't pay much attention to [fol. 90] what these switch crews are doing, do you?

A. Well, in a great many cases, I am there when no switch crew — around, that is true.

Q. I say, you don't pay much attention to the work of the switchmen, do you?

A. No, I don't pay a lot of attention to their work.

Q. You are interested in the physical defects of the cars, aren't you?

A. Yes, sir.

Q. And I suppose you are interested in seeing the blue flag rule is complied with, things of that kind?

A. Yes.

Q. That the fellows are on the job?

A. That's right.

Q. And, being superintendent of these huge yards, these large yards in Denver, it wouldn't be possible for you to spend much time there in the vicinity of the wheel pit, would it?

A. No, I don't spend a lot of time there.

Q. Now, one matter I wanted to clear up; do I understand you to state that when car wheels are removed from the cars, that they are brought back over to the track that has been indicated here as the "wheel track"?

A. Yes, sir.

Q. Your answer is "yes"?

A. Yes.

Q. It is for that reason that you keep the portion of the wheel pit over these tracks—the wheel tracks—open while the boys are working on cars standing on 23 $\frac{1}{2}$?

A. That's right.

Q: Now, the work that was going on when Wilkerson was injured is just the usual, ordinary work of repairing wheels, was it not?

A. Yes, sir.

[fol. 91] Q. And any wheels that were repaired would necessarily be brought first over to the wheel track and taken from there to the point of disposal, wherever it was?

A. That's right.

Q. So, it necessitated the opening of the wheel pit?

A. Yes, sir.

Q. And it was opened in the usual manner with the board across the pit, some—beginning some eight or nine or nine and a half inches—I have forgotten your testimony—to the west of the posts?

A. That's right.

Mr. Black: That's all, thanks.

Redirect examination.

By Mr. McCarthy:

Q. That is Defendant's Exhibit 5, I think that will clear up some of the questions. Mr. Elledge, I show you what has been marked for identification as Defendant's Exhibit 5, and will ask you if you can identify the scene of this picture?

A. I can.

Q. And you state what it is?

A. It's a picture of a man standing next to the car, to the chain post, on the west side and north side of the pit.

Q. And were you present when this picture was taken, Mr. Elledge?

A. Yes, sir.

Q. And do you know who the man is in the picture?

A. Yes, sir.

Q. Who is it?

A. It is A. G. Johnson.

Q. Mr. Johnson; he is an employee there in the yards?

A. Yes, sir.

Q. And is he a—from your observation, is he a man about the same height as Mr. Wilkerson?

[fol. 92] A. Just about the same size man as Mr. —

Q. And is this picture a fair and accurate representation of the chain posts and the chains and the boards, the cover

boards, on the pit at the time that you came to the pit shortly after Mr. Wilkerson was injured?

Mr. Black: Object to the question—

A. Yes, sir.

Mr. Black: —duplicitious, on the ground that the chain post on the north and east is not observable and can not be seen in the photograph.

The Court: Objection overruled.

Q. Will you answer my question? I think you already answered it, "yes"?

A. Yes.

Mr. McCarthy: I think that's enough. I offer this exhibit in evidence, your Honor.

Mr. Black: Object to it on the ground it isn't a fair representation of any matters before the court, produced especially for the purpose, perhaps, of confusion as much as anything else, and I object to it on that ground.

The Court: Objection overruled; it may be received in evidence.

Mr. McCarthy: May this be passed around to the jury?

The Court: Yes, Mr. Black may want to cross examine the witness about it; make whatever explanations he desired with respect to the representations there appearing.

Mr. McCarthy: You may cross examine.

Recross-examination.

By Mr. Black:

Q. Mr. Elledge, when was this picture taken, if you know?

A. I wouldn't be able to state the date that was taken.

Q. Were you present when it was taken?

A. I was.

[fol. 93] Q. Did you help arrange a scene or anything of that kind?

A. No, I had nothing to do with arranging the scene.

Q. But you were there when it was taken?

A. I was.

Q. Now, Mr. Elledge, the man that appears in the picture is facing directly down the track, is he not?

A. Yes, sir.

Q. You can't see that north post at all, can you?

A. No, sir.

Q. Can't see that at all. How high up the top of it comes on the body of the man, we can't tell here with any accuracy, can we, except the chain—

A. You couldn't tell exact; it is 42 inches above the ground, the top of the post is.

Q. If a man were standing with his back to the car, do you think the post would be observable?

A. You may be able to see a slight part of the top of it, I wouldn't know.

Q. Did you take any pictures that day with a man standing with his back against the car?

A. No.

Q. You didn't take any pictures like that?

A. I don't get your question.

Q. At the time the picture was taken, Exhibit 5, did you take any pictures with a man standing with his back against the car?

A. Well, they taken three or four pictures; I could identify the pictures as the pit.

The Court: He said, did you take any.

A. I never take any pictures.

Q. Did you see any taken with a man with his back against the car?

A. I don't recall seeing any with back—

[fol. 94] Q. If they did, you wouldn't recall it now?

A. No.

Mr. Black: By the way, there is one question that I overlooked in cross-examination; may I ask that now?

The Court: Yes, if you are through with the picture, you might let the jury look at it while you proceed with your examination.

Q. One question, Mr. Elledge: I call your attention to the space between the board adjacent to the west rail and the board that extends over the pit to the west of the post, did you measure that space at the time?

A. You mean this opening in here?

Q. Yes.

A. It is 22 inches.

Q. It is 22 inches there. So the record will be clear, the opening between the two boards that go across the pit, Exhibit 1—the opening that is opposite from the post, is 22 inches?

A. That's right.

Mr. Black: Your Honor, I am just indicating to the jury the space that the witness identified there so they will have in mind.

The Court: All right.

Mr. Black: That's all, thanks.

Mr. McCarthy: Mr. Johnson.

ANDERS G. JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bagley:

Q. Your name is—

A. Anders G. Johnson.

Q. Where do you reside?

A. 3741 West Twenty-fifth Avenue, Denver, Colorado.

[fol. 95] Q. Are you employed by the trustees of the Denver and Rio Grande Western Railroad Company?

A. I am.

Q. How long have you been employed by those trustees, or by the railroad?

A. Twenty-four years.

Q. And in what capacity are you now employed?

A. As car man.

Q. And what are your duties as car man?

A. Right now I'm doing the flagging in the passenger yard.

Mr. Black: I didn't—

The Court: Flagging in the passenger yard.

Q. Were you employed as a car man in July of 1945?

A. I was.

Q. And how long prior to that date had you been employed as a car man?

A. Since September, 1922.

Q. And where do you perform your duties as a car man?

A. Now, all over the yard as a flagman.

Q. Is that out at the Burnham yard in Denver, Colorado?

A. That's in the new coach yard at Burnham in Denver, Colorado.

Q. Were you on duty the day that Mr. Wilkerson was injured in the wheel pit at the Burnham yards in Denver?

A. I was.

Q. And what time did you go to work?

A. At eight o'clock in the morning.

Q. And did you see Mr. Wilkerson after he had fallen into the pit?

A. I saw him in the pit after he had fallen in there.

Q. Did you see him immediately before he fell in the pit?

A. No.

Q. Now, when you saw him down in the pit, did you get [fol. 96] down there to try to help him out?

A. Yes.

Q. Did you assist him in getting out of the pit?

A. I was going to, but he walked out himself.

Q. He got out without your assistance?

A. He did.

Q. How did he get out?

A. Up the ladder on the hoist that they move their wheels on.

Q. Now, have you had occasion to work on that wheel pit yourself as a car man?

A. I worked there from the time they built it until September the 15, 1944.

Q. Now, can you tell us when that wheel pit was constructed?

A. We moved over there and started, changed the first pair of wheels there on May the 27th, 1942.

Q. 1942?

A. Yes.

Q. And do you know when the safety chains that guard the wheel pit were constructed?

A. I don't remember exactly, but they were put in there in the spring of 1945.

Q. Do you know what month in the year 1945 they were put there?

A. I think it was around March—February or March, I don't remember which, somewhere in there.

Q. Now, when the car men are working in that pit, the pit is open, with the exception of a couple of boards, is that correct?

A. That is correct.

Q. Now, is it necessary to take those boards off when you are working in the wheel pit repairing a car?

A. It is, if you change wheels.

[fol. 97] Q. What kind of machinery do you have down in that pit to change the wheels?

A. We have a hydraulic hoist that runs on rails the entire length of the drop pit by an electric motor.

Q. So that there are tracks down in near the bottom of the wheel pit?

A. There is.

Q. And you use—you carry the wheels along that track on this hoist?

A. We do.

Q. Now, you are familiar with the board that has been marked Defendant's Exhibit 4?

A. I am.

Q. Did you have occasion to examine that board shortly after Mr. Wilkerson was injured?

A. I did.

Q. Have you examined it again today?

A. Yes, enough to know it is the same board.

Q. And what can you say with respect to its condition now as compared with its condition at the time of the accident of Mr. Wilkerson?

A. Can't see no difference.

Q. Now, did you—withdraw that question. What do the car men use this board for when they are working in the wheel pit?

A. When they are removing and applying wheels to passenger cars, that board is used by the car men to walk from one side of the pit to the other, and it also supports you to go down on the hoist. The hoist has a platform about—oh, I would judge about forty inches below the top surface of the pit, and to get down into the pit, it assists you to get down and back up again.

Q. I will ask you whether or not you car men, while you are working in the pit, use that board as a brace to—

A. Yes.

Q. —brace against?

[fol. 98] A. It does; it helps as a support in case you slip and fall backward.

Q. Now, I will ask you whether or not that board fits firmly on the cement walls of that wheel pit?

Mr. Black: Objected to as leading and suggestive, your Honor; I object to it on the ground, leading and suggestive.

The Court: He may answer the question.

A. It fits very snugly.

Q. Does it have any play in it or any wobble to it?

A. It has not.

Q. I wonder if I may see that photograph. Mr. Johnson, will you please look at that photograph that has been marked Defendant's Exhibit 5; I will ask you whether you are the man that is standing in front of the guard post in that photograph?

A. I am.

Q. Now, after these chains were constructed—after these guard chains were erected, I will ask you whether you were working continuously in that pit during—from the time those chains were erected up to the time Mr. Wilkerson was injured?

A. No, I worked out in the yard as a flagman.

Q. Between the time these were put up and the time Mr. Wilkerson was injured?

A. Yes, sir, I was working in the yard as a flagman.

Q. Did you have occasion to come in, within observation of this wheel pit, in the performance of your duties as such?

A. Sometimes, yes.

Q. Have you any time in the course of your experiences out there in the Burnham yard, ever observed a switchman squeeze or crawl through that space between the guard post and a tourist car and pass over the pit by means of the board in question?

A. I have not.

[fol. 99] Q. Now, are those tracks in the bottom of that pit, are they up above the floor of the pit some distance?

A. There is six-inch timbers in the bottom that those lays on and spiked down to.

Mr. Bagley: I believe that's all, Mr. Johnson.

Cross-examination.

By Mr. Black:

Q. When did you take up your work as a flagman in the yard there, Mr. Johnson?

A. September the 15th, 1944.

Q. You been working as a flagman ever since?

A. Yes.

Q. Whereabouts in the yard do you serve as flagman?

A. All of the new coach yard with the exception of the drop pit.

Q. So, you don't work as a flagman over by that pit?

A. No.

Q. That coach yard is a large yard there, isn't it?

A. Yes.

Q. What is your shift, Mr. —

A. Eight A. M. to four P. M.

Q. What are the duties of a flagman?

A. When they bring in a train —

Q. What is that?

A. When they bring a train into the yard, I flag both ends of it, and when it is time for the train to be taken down to the depot, I go through the train and around it and remove the flags when it is ready to go. If there is occasion to switch a bad-order car in or a car that is doubling, I go around the train, through the cars and notifies everybody they are going to move it, and then remove the flags so they can do their necessary switching.

[fol. 100] About how many trains do you work on on an average eight-hour, would you say, Mr. Johnson?

A. Oh, now we have four or five trains in a day.

Q. What was the situation in June and July of last year; I refer, of course, to 1945?

A. We had little more business then.

Q. You were busier then than you are now?

A. Oh, it isn't a great deal of difference.

Q. What is that?

A. It isn't a lot different.

Q. Your work is mainly performed on the inbound and outbound main line tracks, is it not?

A. Yes.

Q. And the switch tracks they pull those trains in on?

A. Yes.

Q. You never have been a switchman, have you, Mr. Johnson?

A. No.

Q. And you never have been a car repairman since the chains—the safety chains—and the posts were installed here on the west side of the wheel pit, have you?

A. No.

Q. The work you did was before that?

A. That's right.

Q. So, then, you never had any occasion to pass over the board here across the pit in the course of your employment after the claims were installed?

A. No.

Q. Now, you don't have occasion to work in the vicinity of this wheel pit every day or every week, do you?

A. No, just pass by.

[fol. 101] Q. And that is rather infrequently when you pass by, isn't it?

A. Oh, it happens frequently.

Q. Yes; once in a while you pass by?

A. Go by there every day several times.

Q. But you didn't stop there and loiter there, do you?

A. Right.

Q. You are a busy man, aren't you, Mr. Johnson; you have work to do in other parts of the yards, have you not?

A. Sometimes we are awful busy, then again we are not.

Q. That's right; and when you pass by this wheel pit, you are either going to a place of work to the south of the pit, or going to work beyond, to the north?

A. Most of the time, yes.

Q. You are either going to or from work. Now, you don't stop when you are there by the wheel pit to see what the switchcrews are doing, do you?

A. In some instances, yes.

Q. Are you required to, under your employment, to stop there and observe the work of the switchmen?

A. No, but I may explain that.

Q. No, I am asking some questions about that. Do you stop? You are not employed to keep your eyes on the switchmen, see what they are doing?

A. No.

Q. And you have nothing to do with the switching operations in that part of the yards, have you?

A. No.

Q. And your job as flagman doesn't in any way concern the work of the switchmen?

[fol. 102] A. Doesn't.

Q. That is true; how long has it been since you were first informed that your presence would be required here at this trial?

A. Sir?

Q. How long has it been since you were first informed that your presence would be required here at this trial?

A. About a week.

Q. About a week; your name is Anders S. Johnson?

A. Anders G. Johnson.

Q. Well, will you come down here to look at a name on the back of this board, will ask you if that is your name appears there?

A. It is.

Q. Did you write it there?

A. I did.

Q. That was back in August 12 of this year?

A. Right.

Q. You may take the stand. Were you informed, then, you were going to be brought to Salt Lake to testify in this case?

A. No.

Q. Didn't know about that. Mr. Johnson, you never at any time, while you worked over in the wheel pit, remember an occasion where the board that crosses the pit here little distance to the west of the post was out of place?

A. It wasn't; it is permanent.

Q. But that board was just like the rest of the boards, isn't it?

A. It is, only it fits tighter.

Q. The other boards are removed by the men from time to time?

A. They are.

{fol. 103} Q. Are they all made alike?

A. Practically.

Q. Made of the same kind of wood?

A. Yes.

Q. Z-irons on the end?

A. Yes.

Q. And they are all made so that they will work interchangeably as coverings of the pit?

A. As far as I know; I haven't tried to exchange them, but they are practically the same.

Q. When the men cross the pit over the board, how do they—do they walk across it?

A. If the chains are down, yes.

Q. When the chains are down, all of the boards are across, aren't they?

A. That's right.

Q. How do they cross that pit when the chains are up?

A. They would have to crawl under the chains.

Q. No; I don't care about what they would have to do; if you have never seen them walk over, you can say that; maybe my question was little premature: have you ever

seen anybody, car men or anyone else, cross over the pit over the board immediately to the west of the post when the chains were up?

A. I don't remember.

Q. Well, would you say that you have or you haven't or do you have—

A. I would say no.

Q. You never have seen anybody cross over it?

A. No.

Q. But the board is there for people to cross over, isn't it?

A. Yes, and support.

[fol. 104] Q. Well, it may be, but the board is there so men can get across that pit, isn't it?

A. Yes.

Mr. Black: That's all, thanks.

Redirect examination.

By Mr. Bagley:

Q. Did you say you had seen car men go across the pit over this board, Mr. Johnson?

A. I seen them standing on there tightening up bolts and also as they go down, but—

Q. What were they doing when they were standing on the board?

A. Tightening up pedestal bolts with long-handled wrench.

Q. Now, I believe you stated in answer to a question from Mr. Black that it is your duty as a flagman—

A. That's right.

Q. —to put up blue flags?

A. Yes.

Q. Now, do you put up those blue flags—what is the purpose of putting them up?

A. The purpose is to protect the workmen and the employees that is working on the train.

Q. What do they mean? What does the presence of a blue flag mean?

A. It means that men is at work.

Q. And is anybody permitted or allowed to move a car or a train while those blue flags are up?

A. They are not.

Q. And do you also remove the blue flags when the car repairmen have finished their work?

A. Not on the drop pit.

[fol. 105] Q. You don't do that?

A. I don't do that on the 23 and 23½ tracks.

Q. Do you know who does do that?

A. The man that is working on the cars themselves.

Q. But the switchmen do not move those blue flags?

A. They do not.

Mr. Bagley: That is all.

Whereupon, EVERETTE WILLIAM ELLEDGE was recalled for further examination, and having been previously duly sworn, testified as follows:

Further redirect examination.

By Mr. McCarthy:

Q. Do you know when the safety chain posts and safety chains were installed on the wheel pit?

A. It was about May 1 of 1945.

Mr. McCarthy: That's all.

Further recross-examination.

Q. Is there a definite record anywhere available on that, Mr. Elledge?

A. I hardly think so; I don't believe there is.

Q. That's your memory, I take it.

A. That is as near as I know, I remember.

GEORGE P. HAWKINS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCarthy:

Q. Mr. Hawkins, will you state your full name?

A. George P. Hawkins.

[fol. 106] The Court: You better spell that last name.

A. H-a-w-k-i-n-s; 930 Acoma Street, Denver, Colorado.

Q. You are an employee of the Denver and Rio Grande Railroad?

A. Yes, sir.

Q. The trustees of that railroad?

A. Yes, sir.

Q. And you are employed as a car man?

A. Yes, sir.

Q. For what length of time have you been so employed?

A. Ten years.

Q. And during that time have you worked on the wheel pit at the Burnham yards?

A. For the last two years, yes, sir.

Q. For the last two years?

A. Yes, sir.

Q. What shift do you usually work?

A. Eight to four; eight A. M. in the morning to four P. M. in the evening, afternoon.

(Q. And is that your usual customary working place?)

A. Yes.

Q. At the wheel pit. Were you working there at the wheel pit or in the vicinity of the wheel pit at the time Mr. Wilkerson met with an accident?

A. Yes, sir.

Q. On July 26, 1945. Prior to—just prior to Mr. Wilkerson's accident, did you see or have any communication with Mr. Wilkerson?

A. Well, I was working on this pair of wheels and was just finishing the job up... I was standing on the inside, on the table inside the pit underneath the car, and I thought it was Mr. Wilkerson that asked me how soon it would be done. That was just a few minutes previous to the time [fol. 107] that we saw Mr. Wilkerson in the pit.

Q. And did you reply to his inquiry?

A. That it would only be a few minutes more.

Q. That was just prior to any accident that Mr. Wilkerson met with?

A. Yes, sir.

Q. And you were working in the wheel pit at that time?

A. Yes, sir.

Q. Who else was working in the wheel pit?

A. No one was in the pit at that time. My helper was in the high rail; the high rail is just to the opposite end of the pit.

Q. Just—is this what you refer to as the "high rail"?

A. Yes.

Q. Just south of the car?

A. Yes, sir.

Q. Where the inside of the tracks are lower there by—

A. It isn't as deep.

Q. It isn't as deep as the pit?

A. Yes, sir.

Q. By the way, what wheels of this car were spotted over the pit?

A. The center pair of wheels.

Q. That would be the center wheels of the south truck?

A. Yes, sir.

Q. Does this model accurately reflect how the car was spotted over the pit at the time you were working on it?

A. Yes, sir.

Q. After this conversation that you had, will you state what occurred after that?

[fol. 108] A. Well, I went ahead, finished up the job, and the finishing up part of it was just spreading the cotter keys. I had finished it all except that.

Mr. Black: What was that answer, please?

(Reporter reads the answer.)

A. So I came out from under, replaced the board just due west of the rail of 23½; that would be the west rail.

Q. Came out this side—

A. Yes, sir.

Q. —of the wheel pit; and this board, I take it from your testimony, was out. This board right next to the rail?

A. That board was out at that time, yes, sir. I replaced that and I set it on the board that is in place there now. I went over the chains and over to the oil vat which was located—

Q. Excuse me, at that time did you have occasion to step on this cover board?

A. Yes, sir.

Q. Cover board just west of the chains?

A. Yes, sir.

Q. You did step on it that time?

A. Yes, sir.

Q. And you came over the chains?

A. Yes, sir, and walked on just—cut across over to the oil vats, just located just west of the wheel transfer track.

Q. That would be over in this vicinity?

A. Well, it would be—yes, right between there and 24, approximately 35 feet.

Q. About in this vicinity?

A. Yes, sir.

Q. Between the wheel track and track 24?

[fol. 109] A. Yes, sir, and I was—walked back, or walked over there and I heard someone yell for help, so I runs back over here, and Mr. Johnson was already down in the pit with Mr. Wilkerson, and I didn't see Mr. Wilkerson go in the pit, but I don't know how he got there, but he was in the pit.

Q. When you climbed out of the pit—excuse me just a moment—withdraw that question. At the time you heard this—these moans, you were not in the pit at that time?

A. No, sir.

Q. You were over at the oil vats?

A. Yes, sir.

Q. Or oil bins, I think you referred to them. When you climbed out of this pit to go over to the oil bins, state whether or not you saw Mr. Wilkerson at that time?

A. Yes, sir, as I was cutting across diagonally, Mr. Wilkerson was coming down the west side of the pullman, and I passed, oh, within five or seven feet of him. I didn't speak to Mr. Wilkerson and he didn't speak to me.

Q. Mr. Wilkerson was travelling from the north to the south towards the pit?

A. Yes, sir.

Q. About how far was he from the pit at that time?

A. Oh, I would venture to say he was twenty-five feet.

Q. And how long was it after you saw him before you heard the moans?

A. Well, just shortly afterwards.

Q. Can you estimate the time?

A. Oh, I would say possibly three to five minutes.

Q. Now, when you climbed out of this—out of the pit and onto the cover board just west of the safety chains, you say you stepped on the board?

A. Yes, sir.

[fol. 110] Q. And what was the condition of the board at that time?

A. Well, the board was free from oil as far as I could see. It may—I have to keep that board in good condition because I use it at all times.

Q. You stepped on the board?

A. Yes, sir.

Q. And did it tilt or turn?

A. No, sir.

Q. Was it insecure or infirm?

Mr. Black: That calls for a conclusion.

Q. State whether or not it was infirm or insecure.

Mr. Black: I object to that as calling for his conclusion.

The Court: Well, he is asking for the observation of this witness with respect to such matter.

Mr. Black: Yes, I have no objection to that.

The Court: He may state what his observation was with respect to it.

Q. Will you state what your observation was with respect to—

A. It was firm. I didn't notice any looseness about it, or anything under it, that would cause it to—

Q. What is your weight, Mr. Hawkins?

A. I weigh 250 pounds.

Q. And what is your height?

A. Six feet, two and a half inches.

Q. And during your work on this pit, do you have frequent occasion to use this board?

A. I use that board at all times when changing a pair of wheels.

Q. And just state what purposes you use the board for.

[fol. 111] A. The board sets just west of the post. The car that we raise and lower the wheels on sits straight. When it is spotted for $23\frac{1}{2}$ to take a pair of wheels out, the board—the east side of the board—is straight up and down with the edge of the car, so we have to step on that, then up onto the rail of the car, which is approximately forty inches.

Q. Just go back just a moment; you said the east side of what?

A. Of the board that is located just west of the chains.

Q. East side of this cover board?

A. Yes, sir.

Q. What was your statement with reference to that?

A. The—that board, the east side of that board, is straight up and down with the railing of the car that we raise and lower the wheels on, and we have to step—there is a tool box there, too. Now, the mechanism to raise and lower this is located on the right-hand side of this car.

Q. That would be over under the pit?

A. No, it's just approximately on a straight line with that post, is the controls of that car.

Q. Straight line of this post?

A. Yes, sir.

Q. Under the car?

A. Well, it would be practically

Q. Under this high gail?

A. No, sir.

Q. Will you step down and point where you mean?

A. Yes, sir.

(Witness steps down.)

A. The car sets right in here and the controls—

Q. That is the car on the hoist you refer to?

[fol. 112] A. Yes, sir; now, this would be under the direct line here. Now, the railing is directly under this. There is a tool box on this side, and we step on the tool box—step up on the rail—and then up onto the board on this edge right here to get in and out of the pit. Then, if we move the wheel over, my helper also uses this holder on this side; because we bring the wheels over here, and this section of rail moves up here, interlocks with this one, and that is the—we move wheels off, on and off. Then my helper changes his end of the car—his end of the car on this west section right straight up and down on this side of the car. He climbs out on the tool there, on the rail. Then he goes up over or under the chains, and that is the way we operate.

Q. Were you present, Mr. Hawkins, at the time various measurements were made of the dimensions of this wheel pit and the other objects shown by this model?

A. Yes, sir.

Q. And Mr. Elledge, was he present at that time also?

A. Yes, sir.

Q. And at the time those measurements were made, were the objects that were measured, and were the measurements that were made, were conditions the same as at the time when Mr. Wilkerson met with his accident?

A. Exactly; yes, sir.

Q. You were present in court yesterday when Mr. Elledge testified as to those measurements?

A. Yes, sir.

Q. Were the measurements which you made the same or different from those testified to by him?

A. They were the same.

[fol. 113] Q. And I refer particularly to the position of the chain posts and the cover board; were your measurements the same with respect to those objects?

A. Yes, sir.

Q. Now, Mr. Elledge, you work in this wheel pit—you say, you have worked there for the last two years?

A. Yes, sir.

Q. At the time you were working on the pit, what is the situation with reference to the chains?

A. The chains are never taken—never put up until the pit is uncovered. The only time we open that pit at all is when there is a car spotted for a wheel and when we uncover the pit, why then we put the chains on.

Q. During the time that you have been working there, state whether or not you ever observed any switchman or employees other than the car men cross the pit by going between the safety chain post and the car and over the cover board and out the same way on the other side.

A. No, sir.

Q. During the time that you have been working there, have you ever observed Mr. Wilkerson so cross the pit?

A. No, sir.

Q. By going between the chain post and the car?

A. No, sir.

Q. Now, referring again, Mr. Hawkins, to Mr. Wilkerson, at the time that Mr. Wilkerson fell into the pit, were you present when he climbed out of the wheel pit?

A. Yes, sir.

Q. Will you state the circumstances as to how he climbed out of the pit?

A. He climbed up the ladder and I was on the landing—that is, the board of the car. Mr. Johnson was in the pit.

[fol. 114] Mr. Wilkerson climbed the ladder himself, and came out through the regular channels of opening, and he would have to come up the same way that I always come up to get out of the pit; that is, by using the tool box, the rail on the car, and the board.

Q. And at that time, state whether or not you made any inquiry of Mr. Wilkerson concerning his accident.

A. Yes, sir, I did; and Mr. Wilkerson told me he came under the chains—

Mr. Black: He, what?

A. —and his foot slipped.

The Court: Read the answer, Miss Reporter, if you will.

(Reporter reads the answer.)

Q. Mr. Hawkins, I show you what has been marked for identification as Defendant's Exhibit 4; will you state what this is?

A. That is the cover board that was in place the morning Mr. Wilkerson fell.

Q. Do you know how long this cover board was in use after that time?

A. It was up until sometime, I think in August, was when it was removed from the time of the accident; and, previous to the accident, it had been in use just in the condition it is now.

Q. Will you come right down and examine it?

(Witness steps down to the board.)

Q. Will you state whether or not, from your examination of the board, look at the other side of the board also, this side—this is the side that is up, isn't it?

A. Yes, sir.

[fol. 115] Q. You state whether or not, from your examination of that board, it is in all respects in the same condition as it was at the time Mr. Wilkerson was injured?

A. Yes, sir.

Q. Will you state, Mr. Hawkins, how that board fits over the pit?

A. That board fits just as you see it now; the pit runs east and west and the lip—the steel lip on this side—the steel lip on the other side fits closely against the wall—the concrete wall—and this board in particular is just a little bit longer than the other boards to make it just fit a little tighter because that board is also used as a brace; if I'm taking off a nut and a bolt breaks, why that board is the only thing to keep me from toppling over backwards into the pit.

Q. Times you have used it as a brace, was it in all respects suitable for that purpose?

A. Yes, sir.

Q. Is the board ever taken off the pit at all, Mr. —

A. Not—it isn't—it is never removed. There is only one time that I have ever seen it removed; and that was when the pit was flooded, that we had to take—it had raised it. We had to remove it, then the water had forced it up to clean—

Q. How long before the accident was that?

A. That was after the accident.

Q. That was after the accident?

A. Yes, sir.

Q. Do you know of any occasion when it was moved before the accident?

A. No, sir.

Q. What would you estimate that that board weighs, Mr.

[fol. 116] A. Oh, I would say around seventy-five pounds.

Mr. McCarthy: You may cross-examine, Mr. Black.

Cross-examination.

By Mr. Black:

Q. Mr. Hawkins, this board will fit over the pit to any point that it might be placed, would it not?

A. No, sir.

Q. Only one place in the pit it will fit?

A. Yes, sir; that is when you cover the pit, the entire pit, those boards are made in different dimensions, and they have their special place to go.

Q. Well, is that because of irregularities in the top of the pit?

A. Yes, sir.

Q. And the top of the pit is irregular?

A. Yes, sir.

Q. Come down to the box here and show the jury what you mean.

(Witness steps down to the jury box.)

A. There is two boards here—now, these boards here—

Q. That would be to the west of the west rail on the pit track?

A. That would be west of the wheel transfer track.

Q. I think the record indicates that that track is called, for the purpose of this case, the "wheel track"?

A. Yes, sir; all right.

Q. You are speaking of the space to the west of the west rail of the wheel rail, are you not?

A. Yes, sir; there is two boards in there that fit, and they come up snug and around this side of the rail. The same thing is here—the two boards fit to fill this gap snug against the rails here in order to close the pit. This board here is [fol. 117] about nineteen inches on the west of this. Now, this other one here has cut-outs to make it fit tight.

Q. That is on the east side of the rail?

A. Yes, sir, then there is another one that is about nineteen inches in diameter, that this board could not take its place:

Q. I will ask you my question; will the board you have in court fit over the top of the wheel pit at any point that it might be placed between the west rail of $23\frac{1}{2}$ and the tie-ins, or in that neighborhood of the exhibit, directly east of the east rail of the pit track?

A. This board could be forced into here.

Q. In other words, it would fit in any of those places?

A. It is the same width, approximately. It might be a one-eighth of an inch longer board.

Q. Have you measured—

A. And except this one, now, this board here is west of the rail. It will not fit in that—

Q. Because that is made to accommodate the tie-ins?

A. Yes, that is too short—this board here is much shorter than that board and—

Q. Have you ever measured the length of this board from the vertical portion of the Z-iron on the outside to the similar portion of the Z-iron on the other side?

A. I never made it the point to measure it, no, sir.

Q. Never have measured it?

A. No, sir.

Q. Now, Mr. Hawkins, how does grease get on these boards?

A. Very little grease gets on that board. It's only from walking across the board.

Q. Well, grease—

[fol. 118] A. And me with my feet coming up onto that board, also my helper, we carry a lot of that grease up out

of the pit with us, but that is the only time that this grease gets on that board.

Q. Well, I am not interested particularly in times; I want to know how the grease gets on it; the grease comes out of the pit on you men's feet?

A. Yes, sir.

Q. Then when you have occasion to be on the board with your feet, why grease could well get from your feet onto the board?

A. Yes, if there is any grease on your feet.

Q. There is grease in the pit at all times, isn't there?

A. No, the pit is cleaned regularly, about once to twice a week.

Q. You clean it to get the grease out of it, don't you?

A. Yes, sir.

Q. And grease naturally accumulates there by reason of the work you men are engaged in, isn't that true?

A. Not necessarily; not unless there is an overflow of oil.

Q. Well, there is grease at all times in the bottom of the pit except right perhaps after it has been cleaned out; that is why you clean it out is to get the grease out?

A. There is possibly some oil there; it isn't actually a grease; it is an oil.

Q. Do you distinguish between grease and oil?

A. Well, I would say that grease was more of a compact nature than oil is.

Q. But you do—you men, of course, there can't be any question about bringing oil out of the pit onto the pit, and [fol. 119] that that oil oftentimes gets on the board?

A. Yes, sir, but it doesn't get onto that board to any great extent, as you see there.

Q. Well, did you tell the jury it was to your advantage to keep oil and grease off the board?

A. It is to my advantage because if I get grease and oil on that board, I might take a tumble myself into the pit.

Q. If there was grease on the board, that might be a circumstance of danger, would it not?

A. It would be if there was any out there, yes.

Q. Yes; if there was oil or grease on there, that could well cause a man to slip and fall into the pit?

A. Yes, sir.

Q. Now, I take it, Mr. Hawkins, that whenever grease or oil gets on the board, that you men clean it off?

A. Yes, sir.

Q. And I take it that between the time that Mr. Wilkerson fell in the pit and the date that you and the other two gentlemen took the board off the top, which was August 12, 1946, that you had occasion to clean it many times, didn't you?

A. No, sir.

Q. Never did clean it?

A. Once there was a little oil on it.

Q. Once?

A. That I remember of in two years.

Q. What day and time and place was that?

A. Oh, I would say that was about eight months ago.

Q. Well, let's get what month, if we can, that *that*, you saw that little piece of oil on there?

A. I would say in February.

Q. Would you say in February, or is that your best opinion, it was in February.

[fol. 120] A. It must have been in February.

Q. Why do you say "it must have been"?

A. Because it was eight months ago, approximately eight months ago.

Q. You figure because it was eight months ago, it must have been in February?

A. Yes, sir.

Q. Was it in the middle, latter, or last part of February?

A. Middle part.

Q. Forenoon or afternoon that this little piece of oil was on?

A. It was in the morning.

Q. Was that such a strange occurrence that you made a mental note of it that that fact, that in one occasion in the morning, there was one piece of oil on there?

A. It is more or less strange occurrence because we are very careful on that.

Q. Did you become very careful after Wilkerson was injured, or were you very careful before?

A. No, sir, we were very careful all the time we were there.

Q. Why did you have to be careful?

A. It is to our advantage.

Q. Why do you have to be careful about oil?

A. Because we are working; we don't want to get hurt.

Q. You thought oil might invite an accident?

A. We don't want to invite an accident.

Q. How large a piece of oil or grease was that?

A. That was little oil, I would approximately say possibly a couple of tablespoonsful.

Q. Did that cause you to experience any alarm because you found a couple of spoonsful of oil on the board?

[fol. 121] A. Not any particular alarm because I cleaned it right up.

Q. You went right to work cleaning it up?

A. Yes.

Q. Was that thin, hard oil; what kind?

A. Thin oil.

Q. The circumstance was still so remarkable, you remember details of it?

A. I remember that—I remember every incident around the pit.

Q. During the two years, then, you have worked there, only time you ever saw any oil or grease on the board was on this morning about the middle of February, 1946?

A. That's right.

Q. Then there isn't any practice there, then, of keeping oil off the board, is there?

A. Not any general practice.

Q. Is there any practice at all?

A. Yes, there is a practice of keeping it off.

Q. And the practice has had one usage in the two years you have been there?

A. That's right because that is the only time the oil was there.

Q. Nobody ever told you to keep oil off the board?

A. Nobody in particular except at safety meetings it has been brought in.

Q. When safety meetings were held, was the matter of keeping oil off the board mentioned?

A. It was mentioned at this particular time.

Q. In February?

[fol. 122] A. Yes, sir.

Q. Did you report that you had discovered these two spoonsful of oil on that board in the early morning?

A. I didn't necessarily report it; there was another man that did report it.

Q. Another man reported it?

A. Yes.

Q. Did you get up and say that was the first time there had been any oil on that board in two years?

A. I did not.

Q. At any rate, whatever was said was of sufficient importance that the safety council thought there should be something done about keeping oil off the board, is that right?

A. That's right.

Q. What did they do about keeping oil off the board?

A. We cleaned it off any time it was on there, which is the one time I told you about.

Q. Make any record of the oil on the board at that safety meeting?

A. No, sir.

Q. Didn't do that?

A. No, sir.

Q. So, then, up to the time that Wilkerson was hurt, never had been any oil on the board?

A. Not to my knowledge, no, sir.

Q. That is what I am talking about, your knowledge. Then the board—the board, now, I suppose is in the same condition it was on the early morning of the middle of February, 1946, except the oil has been removed, is that right?

A. Apparently so, yes, sir.

Q. Doesn't it appear to you that this board is discolored [fol. 123] and shows the evidence of having seen a lot of oil on it during the years it has been a cover on that pit?

A. No, sir, not necessarily.

Q. You want to tell the jury now that there isn't any oil on that board?

A. Well, I couldn't say there isn't any oil on there; I could say there is no oil on it that would cause a man to slip.

Q. That is true because board—been well cleaned up?

A. Not to my knowledge.

Q. You cleaned it in February?

A. Not to my knowledge just in February, but there has been a lot of wheels changed since February.

Q. You don't get any oil on the board when changing wheels; you told the jury about that.

A. I told you that is true, but that pit has been uncovered many times since February.

Q. This board has never been off?

A. That is true; it has not been off.

Q. All right, let's go back to the first part: how did the oil get on the board?

A. The oil was spilled there.

Q. You don't mean to tell the jury all the evidence of oil appears on this board accumulated there on that early morning of February, 1946?

A. It possibly has accumulated since 1942 when it was first built.

Q. I see; but none has accumulated in the day shift since 1944?

A. Not that you could notice.

[fol. 124] Q. Is the board greasier or less greasy now than it was when you went to work down in the pit?

A. It is just practically the same.

Q. Practically the same?

A. Yes, sir; I would say there hasn't been a great deal of change.

Q. Haven't carried any oil off the board on your feet since that time?

A. I haven't carried any off; may have carried some on, but I don't know that I have.

Q. Now, you state to the jury that when you found Wilkerson there in the pit, that he told you he crawled under the chain, started to cross the board and fell in the pit, is that right?

A. He said he came under the chains; I didn't say he "crawled." I said he came under.

Q. All right, I am in error when — use — word "crawl"; he told you that he came under the chain and got on the board and his feet slipped?

A. Yes, sir, his foot slipped.

Q. His foot slipped and he fell off in?

A. Yes.

Q. Of course, you were interested in the cause of the accident at that time, were you not?

A. Yes, sir.

Q. And I suppose that you made a full and complete report of the matter of this statement he made to you?

A. Yes, sir.

Q. And you thought that that was the explanation of the occurrence?

A. Not necessarily; I couldn't see any grease that he had slipped on.

[fol. 125] Q. You thought the crawling under the chain, or coming under the chain, was an important matter, did you not?

A. Well, that is his—I have no right to forbid Mr. Wilkerson to come under those chains; I am not the foreman.

Q. You thought that the matter of him coming under the chain was important, didn't you?

A. Yes, sir.

Q. You remember an investigation held by your employer in Denver, Colorado in which you testified?

A. Yes, sir.

Q. You were there and testified, were you, before the committee?

A. Yes, sir.

Q. I will give you the date on it, that was at 12:45 P. M., October 19, 1945, is that right?

A. Yes, sir.

Q. And you were there as a witness?

A. Apparently it is; I have forgotten the date.

Q. And many representatives of the railroad company inquired of you about this occurrence, isn't that true?

A. Yes, sir.

Q. Well, now, how was it in that investigation you never mentioned in words or substance or effect that Wilkerson had ever told you that he came under that chain?

A. I believe it is in the record.

Q. If it is, let's find it.

(Hands book to the witness.)

The Court: How long is that report, Mr. Black?

(Discussion.)

Mr. McCarthy: We will agree it isn't in there, the statement.

Mr. Black: It isn't in there; I couldn't find it, I knew that. I will submit this to counsel, then look it over, Mr. [fol. 126] Hawkins.

The Court: You may examine it after you leave the witness stand.

Mr. McCarthy: The statement you asked for is not in that.

Q. Now, Mr. Hawkins, how long ago was it when you were first informed you would be called here as a witness?

A. It was last Tuesday, a week ago yesterday.

Q. Last Tuesday?

A. Yes, sir.

Q. Mr. Hawkins, is it your testimony now that a man the size of Mr. Wilkerson could not pass around between the post and the edge of a standard pullman car?

A. It could be done, yes, sir.

Q. Have you ever tried to do it?

A. Yes, I could do it.

Q. You can do it?

A. But it is at very bad discomfort to me; I have to bend my body, arch my body, in order to make it.

Q. You understand, of course, that the rails there of the pit, that they are built—placed on ties, are they not, and the rails on top of the ties

A. Yes, sir.

Q. You understand that the—your testimony is that agreeing with Mr. Elledge—is that the name, "Elledge"?

The Court: That's right.

Q. That the height of the post is forty-one inches?

A. Forty-two inches.

Q. Forty-two inches; and that there would be nine inches—or nine or ten inches, at least—between the top of the post and the bottom of the car.

[fol. 127] A. Yes, sir.

Q. And that the overhang of the car, the 31-inch overhang, is the overhang of the outside edge of the body of the car?

A. Yes, sir, on the pullman car, yes.

Q. On the standard pullman?

A. Yes.

Q. So, then, the post would be outward at least five inches from the widest part of the overhang?

A. Yes.

Q. And the widest part of the overhang would commence at a point about ten inches above the top of the post?

A. It would be somewhere around there, nine or ten inches.

Q. You are a larger man—you are much larger than Mr. Arbogast or Mr. Wilkerson?

A. Yes, sir.

Q. You are not going to tell this jury it would be any gymnastic accomplishment of any note for a man to pass around that post and the car?

A. It would be for me, yes.

Q. You were able to do it?

A. I can do it, I said, but—

Q. You can do it in spite of the fact—

Mr. McCarthy: Let him finish; he—

The Court: He should be permitted to finish his answer.

A. I said I could do it, but it would be at a discomfort to me to do it. It would not be an established practice,

Q. Well, — not talking about practice; we are talking [fol: 128] about possibility.

A. Well, there is a possibility, yes, sir; it could be done.

Q. You don't think Mr. Wilkerson had as much difficulty in doing it as you do?

A. Well, I don't know whether he would or whether he wouldn't. I never saw Mr. Wilkerson do it.

Q. Well, you weigh 250 pounds~~s~~; Mr. Wilkerson weighs 145; it would be quite a lot of difference in the size—

A. That is true.

Q. —of the bodies of the men, wouldn't there?

A. That's true.

Mr. Black: That's all; thanks, Mr.—

Redirect examination.

By Mr. McCarthy:

Q. At the time of the formal investigation of this case, you say it was your understanding that you didn't so testify concerning what Mr. Wilkerson said?

A. Well, the investigation is quite hazy. It was held quite a while ago, and I couldn't say that they asked me for sure and swear to it, but I was ~~under~~ the impression that I gave that information.

Q. You made no effort to conceal that information?

A. No, sir.

Mr. Black: That's just—I object to the question, move the answer be stricken.

The Court: The question was suggestive and—however, it has been answered and—

Mr. Black: I move it be stricken.

The Court: Well, I think I will deny the motion in view of the fact that it has been answered.

[fol. 129] Q. You recall anyone asking you at the investigation as to what Mr. Wilkerson said to you when he came out of the pit?

A. No, sir, I don't recall anybody; as I say, the details were very hazy, and I don't recall anybody asking me that, but I was under the impression I gave that answer because that is a true story of the accident.

Mr. Black: That is a volunteer statement.

Q. You would have been perfectly willing to make an answer to that?

A. Yes, sir.

Mr. Black: No use in injecting—

The Court: If Mr. Black wants to make an objection, you should give him an opportunity to do so.

A. All right.

Mr. McCarthy: I think that's all.

Mr. Black: That is all, thanks.

Mr. McCarthy: Your Honor, we would like to recall Mr. Wilkerson for just two or three more questions on cross examination if we may.

Mr. Black: Not any objection at all.

Whereupon, CLYDE WILKERSON resumed the witness stand for further cross examination, having previously been duly sworn, testified as follows:

Further Cross-examination.

By Mr. McCarthy:

Q. Mr. Wilkerson, referring to the occasion when you went across the board and fell and were injured, as you began to cross that board, did you look at the board?

[fol. 130] A. I just glanced at the position of the board.

Q. You just glanced at it?

A. Yes, sir.

Q. At that time, did you see any grease on it that would cause you to slip?

A. I noticed one little spot of grease on it.

Q. Did you see any grease that you slipped on?

A. I don't know whether I slipped on that particular spot of grease or not at that time.

Q. Can you say whether or not you slipped on any grease?

A. I think I did.

Q. Mr. Wilkerson, I again call your attention to the deposition which was taken in Denver; you recall that, do you not?

A. Yes, sir.

Q. And you recall that your testimony there was given under oath?

A. Yes, sir.

Q. At that time were you asked these questions and did you make these answers:

Mr. Black: What page?

Mr. McCarthy: Page 16.

Q. "Q. Did you see a rock under the board?"

"A. No, I didn't examine the board.

"Q. Did you see any grease on the board?

"A. There were some grease on the boards, yes, sir.

"Q. How much grease was on the board?

"A. I don't know anything about that."

A. I couldn't tell you how much.

Q. Were you asked those questions, and did you make that answer?

[fol. 131] A. Yes, sir.

Q. Was it true?

A. Yes, sir.

Q. It was true when you said, "I don't know anything about that, as to how much grease was on the board?"

A. Yes, sir, there was some grease on the board.

Q. At that time, also, were you asked this question—Page 24:

"Q. Now, before you stepped on the board from which you fell, I believe you said you just glanced at it?

"A. Yes, sir."

Did you make that statement?

A. Yes, sir.

Q. "Q. And did you observe any foreign substance of any kind on the board?"

"A. There was some grease on it, but I didn't notice that I ever stepped into it, or whether I really got into the grease; that, I don't know, but I know that I slipped."

Were you asked those questions, and did you make those answers?

A. Yes, sir.

Q. And were those answers true?

A. As far as I know they were.

Q. And is that also your testimony at the present time?

A. Yes, sir.

Q. Were you also asked this question—

Mr. Black: Which page?

Q. "Q. But you did not step in any grease that caused you to slip?"

"A. There was some grease on the board."

"Q. That isn't my question; my question was whether [fol. 132] your foot slipped in any grease."

"A. That I couldn't swear to right now."

Were you asked those questions, and did you make those answers?

A. Yes, sir.

Q. Were they true?

A. Yes, sir.

Q. Is that your testimony at the present time?

A. Yes, sir.

Q. At the time you stepped on this board, you say you stated—I believe yesterday—that it felt like it tipped or tilted?

A. Yes, sir.

Q. You don't know whether it did tip or tilt, did you?

A. The board felt to me like it *gived* and started my foot—

Q. As a matter of fact, you don't know whether you—

Mr. Black: I want to be sure the reporter got all of Mr. Wilkerson's answer.

The Court: She may read it.

(Reporter reads the answer.)

Mr. Black: He says something else; but I don't know what it was.

The Court: "It started my foot to slip." Wasn't that it?

A. Yes, sir.

Q. You don't know whether, as a matter of fact, the board tipped or tilted, do you? It felt like it?

A. It felt like the board give under my foot.

Q. But, answering my question, you don't know whether or not it in fact tipped or tilted?

A. Felt to me like there was something under it, that [fol. 133] caused the board to tip or tilt under my foot.

Q. Now, refering to the time that you came through this space between the post and the car, coming from the south and going north, you said that was about an hour and a half before this accident to you?

A. Yes, sir, something in that neighborhood.

Q. At that time, did the board, when you went over the board, did it seem perfectly safe and secure?

A. It did at that time, yes, sir.

Q. Did not wobble or wasn't infirm?

A. No, sir, way I stepped on the board, the board seemed solid at that time.

Q. And that was the last time you went over the board about an hour and a half before the accident occurred?

A. Yes, sir.

Q. Mr. Wilkerson, what are these guard chains up here for in your understanding?

A. To keep people from walking directly into the open pit.

Q. Keep people from falling into the pit?

A. Yes, sir.

Mr. McCarthy: I think that's all.

Redirect examination.

By Mr. Black:

Q. Mr. Wilkerson, calling your attention to the deposition mentioned to you by Mr. McCarthy—and, gentlemen, I am reading from 16—did you not also testify in response to questions addressed to you by Mr. McCarthy, as follows:

"Did you see the grease on it after you slipped?"

"A. I didn't pay any attention to it after I slipped. I didn't notice any grease before"—you got cut off—

"Q. You didn't see any grease on the board before you [fol. 134] stepped on it?"

"I didn't see the grease, but there was some grease on it."

"You didn't see the grease you slipped on?"

"A. No, sir.

"You didn't see any rock?

"No, sir.

"It just felt like that to you?

"It just felt like the board just gave enough to start enough tilting and it started my foot slipping."

That was your testimony then?

A. Yes, sir.

Q. After you started to slip, Mr. Wilkerson, your foot started to slip, will you describe what the movements of your feet were as they went out from under you?

A. The right foot slipped. I tried to catch myself on the edge of the board with my left foot and missed it.

Q. Movement rapid as the

A. Yes, sir, very rapid.

Mr. Black: That's all.

Mr. McCarthy: That is all. That concludes the defendants' case.

CLAUDE WILKERSON, recalled as a witness in rebuttal, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Wilkerson, I will ask you to state whether or not you heard Mr. Hawkins' testimony to the effect that shortly after the accident, you told him in words or substance that [fol. 135] you came under the chain immediately before you fell; did you make any such statement to him at all?

A. No, sir.

Mr. Black: Then that's all.

Mr. McCarthy: That's all, your Honor.

Mr. Black: Mr. Arbogast, would you come forward, please?

GORDON H. ARBOGAST, called as a witness on behalf of the plaintiff, in rebuttal, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Arbogast, can you tell us, if you know how many crews of car men worked the day shift there in the vicinity of the wheel pit?

A. Well, there is just one crew that works on passenger equipment on this particular pit.

Q. And that is the day crew?

A. Yes, sir; it consists sometimes of more than two men; that is, if they have a lot of work, but as a general thing, there is just two men.

Q. Do you know the foreman of that crew by sight or by name?

A. Well, I don't know as I would know the foreman. I don't think they have any foreman of the crew. There is just two men works on the pit there.

Q. Have you seen Mr. Hawkins there working as a member of that crew?

A. Yes, sir, I have.

[fol. 136] Q. During the period of time between the installation of these safety chains and posts and the time when Mr. Wilkerson was injured, I will ask you to state whether or not you ever passed over that board at the west of the post by passing between the post and the standing car while that crew was there working?

A. Yes, sir; I remember of two occasions that I passed through there.

Q. During that period of time?

A. Yes, sir.

Q. While the crew was working?

A. Yes, sir.

Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

A. Yes, sir, I have saw my helpers at different times, and before the chains were placed, we used the board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers.

Q. I am interested in the occasions when the board has been crossed after the chains were installed.

A. Yes, sir, I have saw — fellow by the name of Mason and fellow by the name of — that helped me quite a long time.

Q. They were switchmen?

A. Yes, sir, that crossed the board.

Q. Crossed the board while car was standing over the wheel pit. Did they cross while a car was standing in the wheel pit?

A. Yes, sir.

Mr. McCarthy: I object to it, repetitions.

The Court: Objection sustained; he has answered the question, however.

[fol. 137] Mr. Black: That is all, thanks.

Cross-examination.

By Mr. McCarthy:

Q. How much do you weigh?

A. About 176 pounds, I would judge.

Q. How tall are you?

A. About six foot, two, I guess.

Q. Six foot, two?

A. Yes, sir.

Q. And you want this jury, Mr. Arbogast, to understand that you have crawled between this chain post and this car and held onto the posts and walk around there and step on the board and step out and catch the post on the other side? You want the jury to understand you have done that frequently?

A. Yes, sir, I have did it, emphatically, truthfully.

Mr. McCarthy: That is all.

Mr. Black: That is all, I may be through, but I want to ask Mr. Wilkerson a question. This is somewhat out of order; I would like to recall Mr. Wilkerson again if I might.

The Court: All right.

Mr. Black: Mr. Wilkerson, will you take the stand?

CLYDE WILKERSON, the plaintiff herein, was recalled to testify in his own behalf, he having been previously duly sworn:

Further redirect examination.

By Mr. Black:

Q. As I understood your direct testimony, you held the daytime switching job in the coach yards at all times between the installation of the chains and safety posts at the time you were injured?

A. Yes, sir.

[fol. 138] Q. Your shift was from seven in the morning until three in the afternoon?

A. Yes, sir.

Q. On that shift, did you have occasion to observe the car repair crew that were working in the pit?

A. Yes, sir, various times.

Q. Do you know Mr. Hawkins?

A. Yes, sir.

Q. Did you see him from time to time there working in the wheel pit?

A. Yes, sir.

Q. He was working from eight till four, as I understand it?

A. Yes, sir.

Q. I will ask you to state whether or not during the time I have called your attention, you have had occasion to pass over the pit by going between a standing car and the post, then crossing over the pit and out the other way, while this day crew was working?

Mr. Bagley: Object to that as repetitions, your Honor.

The Court: I think it is, but—

Mr. Black: Not on this repair crew, it is rebuttal evidence on—

The Court: If it is repetitious, it wouldn't make any difference, but just to save time, let him answer the question,

Q. Have you?

A. Yes, sir.

Q. Have you seen other members of the switching crew do the same?

[fol. 139] A. Yes, sir.

Mr. Black: That's all.

Mr. McCarthy: That's all.

Mr. Black: That is our case, your Honor, we rest.

Mr. McCarthy: We rest, your Honor!

(End of the evidence.)

[fol. 140] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 141] IN DISTRICT COURT OF SALT LAKE COUNTY

PROPOSAL FOR SETTLEMENT OF BILL OF EXCEPTIONS—November 7, 1946

Come now the attorneys of record for the plaintiff above named and propose and offer to the Court as Plaintiff's Bill of Exceptions in the above entitled cause the following: The transcript of the proceedings duly certified to by Joyce Richardson, the Official Court Reporter, contained in the within Bill of Exceptions on pages numbered from 1 to 138, both numbers inclusive, on the last page of which appears the Certificate of the Official Court Reporter, and the exhibits referred to in said Bill of Exceptions and identified by marks made by the Clerk as follows:

Exhibit 1, a Photograph of wheel pit,

Exhibit 2, Model of railroad car and wheel pit,

Exhibit 3, Map of railroad yard,

Exhibit 4, Cover board,

Exhibit 5, Photograph,

and copy of Defendants' Motion for Directed Verdict, a copy of Verdict, a copy of Judgment on Verdict, and a copy of the Order extending plaintiff's time within which to prepare, serve and file his Bill of Exceptions, and counsel certify and declare that said proposed Bill of Exceptions constitutes and sets forth accurately and completely all of the evidence introduced, proceedings had, objections made, exceptions taken, and orders, motions or rulings occurring

noted or made during the trial of the above entitled case, and subsequent thereto.

Dated, this 7th day of November, A. D. 1946.

Rawlings, Wallace & Black, Attorneys for Plaintiff,
530 Judge Building, Salt Lake City, Utah.

[fol. 142] IN DISTRICT COURT OF SALT LAKE COUNTY

ACKNOWLEDGMENT—November 13, 1946

Come Now the defendants, by and through their attorneys of record, and hereby acknowledge service upon them on the — day of November, A. D. 1946, of Plaintiff's Proposed Bill of Exceptions herein, and said defendants, by and through their attorneys, do now hereby waive time within which to propose amendments to said Bill of Exceptions and consent that the said proposed Bill of Exceptions is in all respects true, accurate, correct and complete, he may settle and allow the same without further notice to the defendants.

Dated, this — day of November, A. D. 1946.

Farnsworth & Van Cott, Dennis McCarthy, Attorneys for Defendants.

11-13-46—12:00 noon Grant Bagley called and indicated no objection to bill of exceptions certificate being signed in its present form.

J. Allan Crockett, Judge.

[fol. 143] IN DISTRICT COURT OF SALT LAKE COUNTY

ORDER SETTLING BILL OF EXCEPTIONS—November 13, 1946

Honorable J. Allan Crockett, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, who sat as trial judge in the above entitled case, hereby certifies that the Bill of Exceptions proposed by attorneys for plaintiff, consisting of 148 pages, on page 138 of which appears the Certificate of the Official Court Reporter, Joyce Richardson; dated October 29, 1946, and the exhibits re-

ferred to in said Bill of Exceptions and identified by marks made by the Clerk as follows:

- Exhibit 1, a Photograph of wheel pit,
- Exhibit 2, Model of railroad car and wheel pit,
- Exhibit 3, Map of railroad yard,
- Exhibit 4, Cover board,
- Exhibit 5, Photograph,

and copy of Defendants' Motion for Directed Verdict, a copy of the Verdict, a copy of Judgment on Verdict, and a copy of the Order extending plaintiff's time within which to prepare, serve and file his Bill of Exceptions, constitute and set forth accurately and completely all of the evidence introduced, ~~excepting~~ the evidence introduced with respect to injuries, pain, suffering and loss of wages, etc., which evidence was and has been omitted at the request of appellant, proceedings had, objections made, exceptions taken, orders, motions and rulings occurring, noted or made during the trial of the above entitled case, and subsequent thereto, and it appearing that the Bill of Exceptions was duly served upon attorneys for the defendants and the service thereof admitted on the 9th day of November, A. D. 1946, and that said defendants, by and through its attorneys had waived time within which to propose amendments thereto and have consented that said proposed Bill of Exceptions might be presented forthwith to the undersigned Judge without further notice to said defendants, and approved and settled by the Court in the event the Court shall be of the opinion that the said proposed Bill of Exceptions is in all respects true, accurate, correct and complete, and the Court being of the opinion that said Bill of Exceptions is in all respects true, accurate, correct and complete, the same is hereby settled and allowed as the Bill of Exceptions in the above entitled case.

Dated, the 13 day of November, A. D. 1946.

J. Allan Crockett, District Judge.

Attest: Alvin Keddington, Clerk, by Herman J. Hogensen,
Deputy Clerk.

Filed after settlement on 13th day of November, A. D.
1946.

[fol. 145] IN THE SUPREME COURT OF UTAH

APPELLANT'S STATEMENT OF ERRORS RELIED UPON FOR
REVERSL—Filed February 15, 1947

Point I

The Court by its ruling denied plaintiff the right of trial by jury contrary to applicable and controlling federal statutes and decision.

Point II

There was substantial evidence that the plaintiff was engaged in the performance of his duties at the time he was injured.

Point III

There was substantial evidence that the place where plaintiff was injured was a work place, that it was unsafe, and that the unsafe condition was a proximate cause of plaintiff's injuries.

Point IV

The negligence of the plaintiff was not the sole proximate cause of the injuries suffered by him and to hold otherwise would be to revive the old doctrine of assumption of risk.

[fol. 146] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 7017

CLYDE WILKERSON, Plaintiff and Appellant,

v.

WILSON McCARTHY and HENRY SWAN as Trustees of The Denver & Rio Grande Western Railroad Company, Defendants and Respondents

OPINION—Filed November 29, 1947

LATIMER, Justice:

Action for personal injuries which occurred July 26, 1945, as a result of plaintiff's falling into a wheel pit in the defendant railroad's coach yard at Denver, Colorado. The action was brought under the Federal Employers' Liability

Act, Title 45 U. S. C. A., Sec. 51 et seq. From a directed verdict of "No cause of action," plaintiff appeals. The parties will be referred to as they appeared in the trial court.

Plaintiff was employed as engine foreman in defendants' Burnham Yard at Denver, Colorado. His crew consisted of himself, two switchmen, an engineer and a fireman. Plaintiff's work consisted of general passenger car switching in the yard, making up trains, and spotting "bad order" cars for repairs.

The place of the accident was the wheel "drop pit," rectangular in shape, four feet two and one-half inches wide, and ten feet seven inches deep, with concrete walls, the top of which were flush with the level of the ground. This pit ran underneath three or more parallel tracks and was used by the pit men to change or make repairs to the wheels [fol. 147] and trucks of the various passenger cars of the defendants. The wheel pit lay with its long axis approximately east to west, and the tracks crossing it ran approximately north to south. The tracks which crossed the pit and which are concerned in this action were identified as the Wheel Track, which lay to the west, and on which the wheels were brought to and taken away from the pit; and Track Number 23½, which is the track over which cars would be brought to the pit for repair.

When in use, the pit was enclosed on three sides, north, south, and west, by means of four corner-posts and a connecting chain; and on the fourth or east side by whatever passenger car happened to be spotted over the pit for repair. Also, when the pit was in use, all the cover boards would be removed except one called the "permanent board" which always remained in place, and possibly another, which was located immediately to the west of and adjacent to the west rail of Track 23½. It was the permanent board from which the plaintiff fell, (and which is therefore the one of paramount concern to this case). This board was 22 inches wide, 4 feet 2½ inches long, and weighed 75 pounds. It was made up of several planks bolted together, and was located in such a position that its east edge was 9½ inches to the west of the chain posts nearest Track 23½. This board crossed the pit at right angles to the long axis and parallel to the rails of Track 23½. At the time of the accident, the cover board immediately adjacent to the west rail was in place, but it was completely covered over by

the overhang of the floor of the tourist sleeper then standing on the track.

To further describe the immediate scene of the accident, the distance from the west rail of Track 23½ to the near [fol. 148] edge of the permanent board was 45½ inches; the overhang of the car standing on the track was 31 inches; the floor of this car was a vertical distance above the ground of 44 inches; the east chain posts were 36 inches west from the west rail of Track 23½; and the east edge of the permanent board was 9½ inches west of the post nearest the track. The chain posts were 42 inches high. (These measurements are given to assist the reader in forming a picture of the space through which plaintiff squeezed in order to get onto the board from which he fell.) In other words, if a plumb bob were dropped vertically from the west side of the Pullman car to the ground, the horizontal distance between such line and the chain post nearest the car would be five inches at the ground, and would increase to approximately seven inches at the top of the post, because the post leaned slightly to the westward and away from the track. Other and wider types of passenger cars reduced this horizontal distance at the top of the post as much as two to six inches. When the pit was not in use, the posts would be removed from their sockets, the chains taken away, and the entire pit covered over by means of heavily constructed wooden boards similar to the permanent board, having angle irons or "z" irons at either end to make them fit snugly against the concrete edges of the pit.

At the time of his injury, plaintiff was seeking out a Mr. Hawkins who was employed by defendants as a car man, for the purpose of, to use the plaintiff's own words, "to see if he was through with this particular car so the car could be moved and I could go get another bad order car that I knew were in a hurry for and spot it for him . . ." Not seeing Mr. Hawkins anywhere, plaintiff proceeded south along Track 23½ and along the west side of the car which was standing over the wheel pit, and started across the wheel pit, using the permanent board as a walkway. The safety chains were up at the time, and in order for plaintiff to cross [fol. 149] the pit he had to turn sideways and slide between the side of the car and the northeast chain post. He put his right hand on the top of the north chain post nearest the track, turned his body sideways so that he faced west, slid through the 5 to 7 inch space between the car and the

post and swung his body around the post. He then moved a few inches to the west along the north edge of the pit, placed his right foot onto the permanent board, and thereupon fell off the west side of the board into the pit, sustaining the injuries complained of.

Plaintiff was not required by the necessity of finding Mr. Hawkins to cross the wheel pit at all. He could have gone around the pit, an added distance of forty-odd feet; he could have observed whether the blue flag had been removed from the track; which would have indicated the work was finished and the car was ready to be moved; or else he could have stopped at the north side of the pit and called out for Mr. Hawkins or his helper and obtained the desired information that way.

Plaintiff testified that when he crossed this same board about an hour and a half before the accident, he observed some grease or oil on the board; and that at the time of the accident he felt as if his foot slipped. The evidence was that the car men coming up out of the wheel pit would track some grease and oil onto this board, and further, that defendants had not cleaned off the board for the past eight months prior to the accident, though they did clean out the bottom of the pit once or twice a week.

Plaintiff testified that prior to installation of the safety chains it was the practice of the men working generally in the yard to cross the wheel pit by means of the permanent board, and that there was no change in this practice after the chains were put up, other than that the men had to go [fol. 150] around the post and between it and the side of the car standing on the track. Plaintiff further said that he had never received any instructions forbidding him to cross the pit in this manner. However, the testimony in regard to the claimed practice of employees going between the posts and the cars was directly contradicted by Elledge, the general car foreman; by Hawkins, the car man working at the pit; and by Johnson, a flagman, all of whom testified that, since the chains were put up, they had never seen anyone other than the car men working in the pit cross the pit by means of the permanent board.

Much has been said in recent cases about the lengths to which the Supreme Court of the United States has gone in requiring submission to the jury of cases arising under the Federal Employers' Liability Act. And much has been said about how a failure to submit a case to the jury deprives

plaintiff of a constitutional right. Illustrative of how far one of the Federal Courts has gone in its analysis of the recent decisions of our highest court is the following quotation from *Griswold v. Gardner*, (C.C.A.7), 155 F. 2d 333, 334:

"The Supreme Court, commencing with *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143, A. L. R. 967, in a succession of cases has reversed every court (with one exception herein-after noted) which has held that a defendant was entitled to a directed verdict. In the *Tiller* case, the Supreme Court reversed the Court of Appeals for the Fourth Circuit, 128 F. 2d 420, which had affirmed the district court in directing a verdict. The case, upon remand, was again tried in the court below, where a directed verdict was denied. For this denial the Court of Appeals reversed, and again the Supreme Court reversed the Court of Appeals, holding that the district court properly submitted the case to the jury. In *Tenant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, this court reversed the district court on account of its refusal to direct a verdict, and our decision, 134 F. 2d 860, was reversed by the Supreme Court. In *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, the [fol. 151] Supreme Court of Vermont held that there should have been a directed verdict for the defendant, and the Supreme Court reversed the decision of that court. In *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, the Supreme Court reversed the Supreme Court of Pennsylvania which had held that there should have been a directed verdict. In the recent case of *Lavender, Admr., etc., v. Kurn, et al.*, 66 S. Ct. 740, the Supreme Court reversed the Supreme Court of Missouri which had held that there should have been a directed verdict for each of the defendants."

There are, however, at least two good reasons why the statements set forth in the foregoing opinion are not persuasive in this case. The first is, consideration has been given only to those cases wherein the Supreme Court granted certiorari; and the second is, that in all those cases,

the Supreme Court re-affirmed its holding, that plaintiff, in order to recover must still show negligence on the part of the employer.

In two of the latest pronouncements by that court, the rule requiring plaintiff in a suit based upon the F. E. L. A. to establish negligence of the employer, is re-affirmed. In *Ellis v. Union Pacific R. R. Co.*, 91 L. Ed. 433, 435, decided February 3, 1947, reversing 146 Neb. 397, 19 N. W. 2d 64, is found the following quotation:

"The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury." 45 U. S. C. A. Sec. 51; *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484, 88 L. Ed. 239, 245, 64 S. Ct. 232. Whether those standards are satisfied is a federal question, the rights created being federal rights. *Brady v. Southern Ry. Co.*, supra; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062."

In *Jesionowski v. B. & M. R. Co.*, decided January 13, 1947, 91 L. Ed. 355, 358, 15 Law Week 4159, reversing 154 F. 2d 703, the Court said:

"... Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's [fol. 152] negligence. We hold that they were."

While the Ellis case, *supra*, holds that whether or not the standards of care required of an employer are satisfied is a federal question, it does not hold that a trial court is precluded from directing a verdict where there is no substantial evidence in the record to show the employer has not satisfied the standards of care required of him.

If we follow the rule set out in the case of *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, then we must determine from the record whether or not there is more than a scintilla of evidence of defendant's negligence. If there is, then the court erred in directing a verdict; otherwise, it did not.

The record indicates the following factual situation in regard to whether or not the plank was a "place to work" for the plaintiff. For some time prior to the first day of May, 1945, the wheel pit had not been enclosed with chains, and, according to plaintiff's witnesses, the employees of the defendants working in the yard were accustomed to use the permanent board as a footpath across the pit. While the record is silent as to the following, it can be reasonably inferred that prior to the time the chains were put up, the pit was a hazard to both employees and other persons who might be passing through that area. Even plaintiff conceded in his testimony that he thought the chains were placed around the pit to keep people from falling in. Prior to the time the pit was enclosed the testimony indicates a custom was prevalent on the part of the switchmen and pit crewmen to walk across the board, and the evidence may be adequate to show this custom was of sufficient notoriety, and indulged in over such a length of time as to charge defendants with knowledge of its existence. However, defendants, nearly three months before the accident, attempted to stop [fol. 153] this practice by enclosing the pit. This is not the case in which an employer attempts to stop an unsafe practice by publishing written notice to employees to discontinue. No rules or regulations to prohibit the practice were promulgated. Instead, the defendants adopted a different, and we think a more effective method of notifying the employees generally in the yard to stop the practice of crossing the wheel pit. They blocked the path.

If, as indicated by the testimony, the employees of defendants were using the plank as a crosswalk, prior to May 1, 1945, was the erection of the guard chains and posts on or about that date notice to those not working in the pit that the plank was no longer thereafter to be used as a pathway? And, if the chains were notice to switchmen and to the plaintiff, was the fact, if it be a fact, that switchmen were ignoring the barricade and continuously disregarding the purpose of the chains, directed to the attention of the defendants? These questions must be answered to properly determine defendants' negligence, for the reason that negligence in not furnishing plaintiff a safe place to work is dependent in part upon whether defendants could reasonably except plaintiff to use this plank in carrying out his duties. Some types of work are inherently dangerous, and require considerably higher safety standards than

do others, and an employer must bear this in mind in maintaining the premises where workmen are required to be. In this particular situation, if the defendants could have reasonably anticipated that switchmen were going to use the method adopted by plaintiff in crossing the pit, the erection of the chains, rather than being a safety measure, would have been negligence, as the chains did in fact make the crossing of the pit, by means of the board, more hazardous. It required the employee to depart from a straight course, swing himself through a narrow space of five to [fol. 154] seven inches, step over at least a 9½ inch open space, and approach the board from an angle that would have a tendency to cause a man to slip and fall.

To hold that the defendants did not intend to close off the plank as a place to work for employees generally would be to accept a most unreasonable inference. In treating the question of notice to appellant, the following facts are significant. It was not necessary for appellant at the time of his injury, or for aught that appears, at any other time, to use this particular pathway. Other and safer routes were open to him. The construction of the enclosure was such that with a standard tourist car there was not to exceed seven inches in clearance between the overhang of the car and the guard post. On wider cars, the clearance was less. To an ordinary reasonable person it was obvious that the railroad company had intended to close this pathway to all traffic crossing the pit. There just would not be any sense or logic in forcing plaintiff to go to the extent of literally squeezing himself between the post and car if it were intended to permit his continued use of the crossing. Chains running parallel with the plank might have been helpful, but chains running at right angles to the plank could be of no assistance, rather they would be an extra hazard.

The evidence quite conclusively shows that the board had its place in the scheme of things in the repair yard; and that its principal purpose was for the use of the pit crew. The members of this crew had to use it to get from one side of the pit to the other, and had to use it to get down into and out of the pit. Besides, they used it as a brace when doing certain kinds of work. Most of the use was while they were working in the pit, although the evidence is susceptible of being interpreted to the effect that the pit crew used the board for crossing the pit inside of the chains. Even though the latter use be conceded, such use does not

[fol. 155] extend to all other workmen in the yard. A pit man may be required to cross a plank to get into or across the pit, and a brakeman may be required to climb a ladder to get onto a car, but neither of these means should be used except by those employees whose duties reasonably require their use. And particularly they should not be used when they unreasonably increase the risk to be encountered by the employee. In this particular case, the board appears adequate for the use of the pit crewmen, but entirely inadequate if intended to be a crosswalk for other employees. Employees climbing in and out of the pit approach more deliberately, use other and different hand holds, and are more careful of their footing, while employees swinging on to the plank in a hurry are apt to forget about the slippery condition of an oily board and forget about the dangers incident to crossing, as did the plaintiff, who swung himself around the chain post and onto the plank. Defendants must have appreciated the dangers of an open pit with an unguarded passageway across it, and have installed the safety chains to warn employees of the danger. Had they not intended to preclude the use of the board as a walk-way, the defendants would not have installed the chain posts so as to block an open straight approach to the board. Accordingly, we hold that the installation of the chain and posts was notice by defendants to all employees generally in the yard that the board was not to be used as a walk-way for crossing the pit.

Such being the case, did plaintiff's evidence establish a subsequent use of the board for a crosswalk by carmen in such a manner as to charge defendants with notice that it was being so used? We think not. The evidence as to the custom and practice of switchmen going between the chain [fol. 156] post and the side of the car came from the testimony of five witnesses. The three witnesses for defendants testified that they worked either in the pit or in the vicinity of the pit, over extended periods of time, and that they had never seen anyone other than pit crewmen cross the pit by means of the board after the chains were put up. This evidence given by witnesses for defendant is not referred to for the purpose of suggesting that this court is reconciling the dispute, if any. It is referred to solely for the purpose of showing that defendants' evidence in no way added to that produced by the plaintiff.

The plaintiff and one witness called by him testified in regard to the use of the board as a pathway, and the following is the record of their testimony. Plaintiff testified as follows:

"Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

A. Walked right straight across the board.

Q. Was there a board usually there to walk over?

A. Yes, sir.

Q. Was there any change in that practice after the chains were installed?

A. None, only they had to walk around the chains.

Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit.

A. No, sir.

Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

A. Yes, sir.

Q. What did you observe with reference to the number of times the occasion when men would cross over the pit.

A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary, pullman employees and so forth.

Q. Crossed over the pit?

[fol. 157] A. Yes, sir, it was a common practice for everybody to use that that way."

It will be noted from this testimony that it is in no way limited as to dates or employees. The witness could have been talking about the time before the chains were installed, the time after the chains were installed, or both. If we assume the most favorable version to the plaintiff, this would establish the time as after the chains were installed, but there is no way of telling how much of the use must be credited to the car or pit men, who were constantly using the

board in connection with their duties, and how much of the use was chargeable to the switchmen.

The other witness for plaintiff, Arbogast, testified as follows:

"Q. During the period of time between the installation of these safety chains and posts and the time when Mr. Wilkerson was injured, I will ask you to state whether or not you ever passed over that board at the west of the post by passing between the post and the standing car while that crew was there working?

A. Yes, sir, I remember of two occasions that I passed through there.

Q. During that period of time?

A. Yes, sir.

Q. While the crew was working.

A. Yes, sir.

Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

A. Yes, sir. I have saw my helpers at different times and before the chains were placed, we used the board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers.

Q. I am interested in the occasions when the board has been crossed after the chains were installed.

A. Yes, sir. I have saw a fellow by the name of Mason and fellow by the name of —— that helped me quite a long time.

Q. They were switchmen?

[fol. 158] A. Yes, sir, that crossed the board.

Q. Crossed the board while car was standing over the wheel pit. Did they cross while a car was standing in the wheel pit?

A. Yes, sir."

An examination of this evidence shows the witness could identify two switchmen who crossed the plank during the three months period, but it is entirely lacking in those elements necessary to show acceptance of a custom or practice by acquiescence. The use by employees other than the two is confused between the times before and the times after the installation of the safety chains.

This case is analogous to a case involving the doctrine of waiver of a rule by non-enforcement, and a similar principle of law is involved. Here the employer has furnished a reasonably safe place to work, but is charged with negligence because it has failed to prevent a claimed practice which rendered an otherwise safe place, unsafe; the employer being charged with knowledge of the disregard of his warning chains, because of the notoriety with which the employees have used the plank after the erection of the guard chains, and the length of time the practice has been in vogue. To impose this duty on the employer, the board must have been used as a place to work by others than the pit crew, so openly and habitually and for a long enough period of time to raise the presumption that the defendants or those appointed by them had consented to the use or acquiesced in it. If the trial court could say, as a matter of law, that plaintiff had failed to establish, by any substantial evidence, either the time or the notoriety element, then the directed verdict was proper. In the present instance the chains and posts enclosure had been erected and in use approximately [fol. 159] three months. The pit was completely covered when not being used by the pit crew and during the covered period the planks could have been used as a walkaway with safety. The pit crew was required to use the plank to get from one side of the pit to the other, so the use of it by the pit crew while working in the pit would not be notice to the defendants that the plank was being used by other employees. The only period that plaintiff could rely upon to show use would be the time when the pit was uncovered and the posts and chains in place, and the practice would be limited to the use of the board as a walkaway. The evidence of plaintiff, at the most, established a questionable, sporadic and occasional use of the board in the manner contended for by him, and for a short period of time. This is not sufficient to charge the appellants with notice of the unsafe practice. The evidence falls short of that required to establish a presumption that the defendants had consented to or acquiesced in the improper use of the board as a pathway. There must be a limit beyond which the employer need not go to protect the employee. If not, then the erection of barricades, the construction of safety devices, and other protective measures do not assist in relieving the employer from liability. They add additional burdens upon him. If he erects one or many, he must, at his peril, see

that the employees do not disregard its purpose or their purposes. Failing to do this, he becomes negligent, not because he has failed to provide a safe place to work, but because the employees pay no attention to the safety devices furnished for their protection. While we hold an employer must use reasonable means to protect employees, when, as here, an effective measure has been taken to close off a walkway over a pit to a class of employees, before one of that class can disregard the warnings and recover for injuries sustained while using the closed area, the evidence of consent or acquiescence in the use by the employer must be substantial that the period of use, in the manner [fol. 160] tended for, was of such duration and the use so habitual and of such notoriety that a reasonably prudent employer could be presumed to have consented to the use. The record fails to disclose sufficient evidence to meet the requirements.

Plaintiff sets out three separate grounds as to why he claims the premises were unsafe. Firstly, that the defendants caused a loose plank to be set over the wheel pit, and due to its insecurity the plank turned when plaintiff stepped on it. Secondly, that defendants caused plaintiff to pass over over the wheel pit and at a time when the plank was insecurely attached to the sidewalls. Thirdly, defendants permitted grease and oil to accumulate on the plank, and this, together with the narrowness of the plank, caused plaintiff to slip and lose his balance.

With respect to plaintiff's first and second specifications of defendants' failure to provide him with a safe place to work, the court was not in error in holding against the contention of the plaintiff, as there was not sufficient evidence to submit these questions to the jury. Plaintiff was the only witness who gave testimony on the insecurity of the board, and even he made no claim that the board was improperly constructed, so as to be insecure. The substance of plaintiff's testimony on these two specifications was that the plank felt to him like there was a little rock or gravel which caused it to tip. That he was guessing about the rock and gravel, but it felt like it tipped or tilted. However, he had gone across the plank approximately $1\frac{1}{2}$ hours before, and at that time it was solid. Other witnesses testified to the construction of the board, and the manner in which it was affixed to the sides of the pit, and all agreed that the board fit firmly and there was no play in it. That the permanent

board was for the use of the pit crewmen, and was used as a brace by them while working on the cars.

[fol. 161] One witness who worked in the pit testified that he heard someone yell for help, and he immediately went down into the pit to assist him. That he used the board to climb out of the pit within three to five minutes after the plaintiff's fall, and that it was firm and secure at that time. Plaintiff and his witness, Arbogast, further corroborated the testimony of the other witnesses by their statements that they had used this board as a pathway. Their testimony is silent as to the insecurity of the board at these other times. When this evidence is considered together with the board itself, which was introduced as an exhibit, and the photographs of the pit showing the board in place, it can be definitely stated that plaintiff's guess as to the tipping was not sufficient to raise a reasonable inference of any insecurity of the board.

The other specification of negligence presents a much more difficult problem and directly relates to the previous discussion of what constitutes a "place of work" for plaintiff.

The reason for discussing defendants' knowledge, either actual or constructive about the use being made of the plank, is for the purpose of determining whether the maintaining of a 22-inch board for a walkway, which is almost certain to become greasy or oily, constitutes negligence. It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure.

It seems inconceivable that the defendant company would construct a safety chain and block the use of a pathway only to increase the danger to part of the personnel expected to [fol. 162] use the plank. The eastern posts were placed as close to the track as was reasonably possible, and plaintiff had to do the unusual to discover a way to get hurt. To require an employer to furnish a place to work so safe that an employee by his own acts cannot render it unsafe, is placing an unreasonable burden on the employer. This would in effect make the master the insurer of the safety of the servant.

While the law requires the employer to furnish the employee with a safe place to work, it does not require that the master be an insurer of the safety of the servant, and maintain every "place of work" safe from negligent use by every employee. The cases cited by the plaintiff do not so hold. *Thompson v. Boles*, 123 F. 2d 487 (a case in which a brakeman fell from a bridge because of a defective railing); *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1444 (an employee tipping a car of coal on a trestle); *Boston & M. R. R. v. Meech*, 156 F. 2d 189 (an employee stripping an engine on a washstand); *Ellis v. U. P. R. R. Co.*, 91 L. Ed. 433, *supra* (in which an employee was killed because of an impaired clearance); *Lavender v. Kurn*, 66 S. Ct. 740 (a switchman hit by a hook swinging from a car); *Eglsaeer v. Swandrett*, 151 F. 2d 562 (engineer falling from catwalk). In all these cases, the employee was performing his work at a place where the master had or was charged with knowledge that the servant would be. That being so, the employer must make the premises safe for those particular purposes. In this case, the defendants had no knowledge, actual or constructive, that switchmen were using the plank to carry out their tasks, and therefore, they were only required to keep the board safe for the purposes of the pit crewmen. This is not the case where the employer is charged with notice that the employee will work at the place frequently or infrequently. This is instead the case in which the employer has no reason to suspect that the [fol. 163] employee would disregard obvious warnings and negligently cross the plank from which he fell and was injured. The evidence in this case fails to disclose that the employer was chargeable with notice that the switchmen would use the plank for a walkway. Accordingly, the standard, we hold, required of the defendants in this case, was to furnish a board safe for the purposes of the pit crewmen, and not for all the employees in the yard. With this standard in mind, neither the narrowness of the board nor the presence of a small amount of grease would present a question of negligence, as to this plaintiff. The board was wide enough for all purposes for which it was intended and with pit men repeatedly getting up onto the board from down in the pit, it would be almost a physical impossibility to keep the board continuously free from oil and grease.

In the case of *Boston & Maine R. R. v. Meech*, *supra*, the U. S. Supreme Court denied certiorari and, in effect, placed

its stamp of approval on a holding of the 1st C.C.A. that the master was negligent because other reasonable safety precautions could have been taken to protect the employees. The holding in that case must be considered in the light of the facts of the case. Applying the same rule to the case at hand, it is difficult to see how defendants could have adopted other reasonable measures that would have afforded more protection to this plaintiff. The chains indicated a closed area; the hazard was readily apparent; the warning sufficient; visibility was unimpaired; plaintiff was familiar with the width, location, and depth of the pit; the condition of the board was known to the plaintiff; there were no latent defects to ensnare him; if the board had any grease on it, plaintiff knew of this fact, as he claims to have seen the presence of a small amount some $1\frac{1}{2}$ hours before his fall; there was no trap to mislead plaintiff, and for all practical [fol. 164] purposes, the gateway across the pit was closed.

Plaintiff's counsel has suggested some additional measures defendants might have taken but none of these would have added to plaintiff's protection. Two of these will be referred to. Had the chains been taken down as suggested by counsel, a safer place would not have been the result; instead, the result would have been the opposite. Also, a sign not to cross would have afforded plaintiff no additional security or warning, for he disregarded the chain and he would not doubt have ignored another form of warning. Other suggested measures might be discussed, but with little purpose. No case has yet been published wherein an employer has taken every conceivable precautionary measure to protect the employee and it is doubted that any such case will ever be reported. The burden on the defendant in this case must be kept within reason, and, from the record before us, we think the jury could have come to only one conclusion, and that is, that the defendants had discharged their duty to the plaintiff in this case by furnishing him a safe place to work. Such being the case, the trial court did not err in directing a verdict for the defendants.

The judgment of the court below is affirmed, with costs to respondents.

We concur:

Roger L. McDonough, Chief Justice; Eugene E. Pratt, Justice; James H. Wolfe, Justice.

WADE, Justice (dissenting):

I dissent. My disagreement with the prevailing opinion is very largely on the construction which we should place [fol. 165] on the undisputed facts, and on the inferences which should be drawn from the evidence of a continuing use of the permanent board. The basis of my discussion of these problems will be the facts as stated in the prevailing opinion. For although those facts are not stated unduly favorably to the plaintiff yet they are sufficient for the points which I wish to make.

First as to the construction to be placed on the placing of the chains around the wheel pit. I do not think our problem is to determine what was the intention of the defendants in placing the chains as they did in that position. Our problem is rather to determine what should the defendants have anticipated would be the effect of thus placing the chains, on their employees who had in the past been using the permanent board to cross from one side of the pit to the other when the pit was open. What the defendants' intention was in so placing these chains is immaterial, the same as any other unexpressed intention which they may have had. The only thing we are concerned with is what intention did they communicate to the plaintiff and their other employees by such act. In other words since they did not expressly by oral communications or by any written statement indicate to the plaintiff and other employees, that they were no longer to use this board in crossing the pit when it was open, could they reasonably anticipate that the mere placing of those chains around the pit in the manner which they were placed would be sufficient to cause the plaintiff and other employees similarly situated to desist from using that board in crossing the pit in cases where to do so was the most convenient way to get where their work required them to go.

In determining what was the intention of the defendants [fol. 166] in placing the chains around the pit the prevailing opinion points out that it would be more dangerous for plaintiff to pass around the post and between it and the car, and back on the permanent board and then on across the pit, with the chain there as it was placed, than it would be for him to merely walk across the board without any chain. This would have some weight in determining what were defendants' intentions in placing the chain there,

but it has very little bearing in determining what should the defendants reasonably anticipate would be the effect thereof on plaintiff and other employees similarly situated. While we cannot presume that defendants would intentionally change the situation so that it would be more dangerous for plaintiff to perform his work we can infer from the facts that such was the effect of so placing the chain around the pit. And while they may have intended by placing the chain around the pit to notify plaintiff and other employees similarly situated not to use the permanent board in getting from one side of the pit to the other, still we may conclude that defendants should have known that it would not be an effective means of giving such notice. Of course the placing of the chain around the pit did have the effect of preventing someone from falling into the open pit at other places where it was not covered by the permanent board.

The evidence is undisputed that before the chain was placed around the pit, plaintiff and his crew and other employees similarly situated, when the pit was open, used the permanent board regularly to cross from one side thereof to the other; that at times their work required them to go from one side of the pit to the other and this was the most convenient way to do so; that when the pit was closed, both before and since the chain was placed around it, such employees have regularly walked over the boards which covered it including the permanent board; that no one has ever [fol. 167] told plaintiff that he was expected not to use this board in crossing over the pit nor has he ever been so notified in writing. The permanent board is 22 inches almost two feet wide, it weighs 75 pounds, it consists of three heavy planks firmly bolted together and it fits firmly in a groove made therefor on the sides of the pit. It gives ample room for a person to walk across it and its appearance would suggest that it was put there for that purpose. The prevailing opinion suggests that it would only be 40 feet further to go around the pit, to have to go that much farther would seem to a man busy at work too far to go around when he could get where he was going merely by stepping over or stooping under a chain or by swinging around the post as plaintiff did. It is also clear that the men working in this pit regularly used this board in crossing from one side thereof to the other. Under these circumstances, since the danger in doing so without stopping to consider the possibil-

ities is not apparent, and since human experience teaches that busy men do often take such chances, in my opinion the defendants had they acted as ordinary, prudent men, would have anticipated that the plaintiff and the other employees who were similarly situated would continue to use this board to cross the pit just as they had used it before the chain was placed there. To me it seems that this is the thing that you would naturally expect them to do.

This is not exactly the negligence which plaintiff pleaded. But the evidence of such negligence was supplied by both parties without any objection that either party was surprised thereby and not prepared to meet it. By the nature of this evidence it was of necessity developed in showing the facts as they existed which facts were relevant to the issues as made by the pleadings. It is a well recognized rule [fol. 168] in this and other courts that where plaintiff alleges a wrong committed in one manner and the defendant proves that he did not commit the wrong in the manner alleged but did commit that same wrong in a different manner, that the court may award in plaintiff's favor on the basis of the facts as proved. I think the principle involved in that kind of a case is applicable here. It would probably have been better had plaintiff asked leave to amend his complaint to conform to the proof, but as long as the proof was before the court and no one had been deprived of full opportunity to rebut or disprove it I think that question should have been submitted to the jury.

It may well be that plaintiff himself was guilty of contributory negligence in attempting to cross the pit on this board by swinging around the post as he did. Obviously had he stopped to think he would have recognized that to swing around this post was more dangerous than to go around the pit, or to step over or stoop under the chain. But under the Federal Employee's Liability Act contributory negligence is not a defense. If the evidence shows that the defendants' negligence was a contributing proximate cause of the accident that is all that is necessary. In this case, in my opinion, all that was necessary was that a showing be made that the defendants as reasonable persons should have anticipated that plaintiff and the other employees similarly situated would continue to use this board in crossing the pit and that in so doing the place to work was unsafe. This question I think should have been submitted to the jury.

Even if we were to conclude that the placing of this chain around the pit was in itself sufficient notice to plaintiff and the other employees similarly situated that they should not use this board to cross the pit when it was open; I think the [fol. 169] evidence is sufficient from which the jury could reasonably find that such employees had continued to so use this board after the chain was placed around the pit the same as they used it before so as to notify the defendants of such use and that in view of such use this was an unsafe place to work. In my opinion neither the record nor the extracts therefrom quoted in the prevailing opinion can be read without concluding that plaintiff and his witness were positively testifying that after the chain was placed there, plaintiff and his crew and the other employees similarly situated continued to use this board to cross the pit whenever it was convenient for them to do so, as they did prior to the placing of the chains, and that neither of them receded from this positive testimony or testified contrary thereto on cross examination. While plaintiff's witness on cross examination only mentioned the names of two persons and two occasions when he saw such employees crossing the board when the pit was open after the chain was placed around it, this does not mean that those two occasions were the only ones where he saw such employees cross the board after the chain was placed around the pit. It only means that those two occasions were all that readily came to his mind. It might well be that he could have seen such employees cross that board over and over again and still only be able to recall two specific events when that had occurred. If that had become a common occurrence in his day's work, it would be natural that he would not retain them so that he could mention each one of such events.

Nor do I agree that the fact that three other employees of the defendants testified that they had not seen plaintiff or any other employee similarly situated cross the board when the pit was open after the chain was placed around it, was very strong evidence that such was not the custom. [fol. 170] It is not shown that had this been the custom that these witnesses would have remembered seeing this happen, these witnesses were not shown to have been there constantly nor was it shown that had they seen such employees so cross the board that they would have remembered it. So their testimony is not necessarily in conflict with the testimony of plaintiff and his witness. But even if it were, in my opinion, it is still a question of fact for the jury

and we cannot determine this fact against the plaintiff as a matter of law.

I therefore am of the opinion that this case should have been submitted to the jury on these issues.

[fol. 171] IN THE SUPREME COURT OF UTAH

JUDGMENT—November 20, 1947

"This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, affirmed, with costs to respondent."

[fol. 172] IN THE SUPREME COURT OF UTAH

GROUND RELIED UPON BY APPELLANT IN SUPPORT OF HIS PETITION FOR REHEARING—Filed December 31, 1947

Point I

This Court has by its opinion herein deprived the plaintiff of a jury trial and has decided this case contrary to the opinions in controlling cases decided by the Supreme Court of the United States.

Point II

This Court erred in deciding as a matter of law that the chains and posts around the pit constituted notice to plaintiff and other employees that they should not use the plank to cross the pit when the pit was open and the chains were up, and that therefore the plank from which plaintiff fell was not a place of work for plaintiff.

Point III

This Court erred in deciding as a matter of law that there was insufficient evidence from which a jury could find a custom of trainmen and other yard employees of walking around the chain posts and using the plank as a walkway when cars were over the wheel pit.

Point IV

This Court erred in deciding as a matter of law that the place where plaintiff was injured was not a place of work

and that even assuming it were a place to work, defendant was not negligent in maintaining it in an unsafe condition.

[fol. 173] IN THE SUPREME COURT OF UTAH

ORDER DENYING PETITION FOR REHEARING—Filed February 10, 1948

"Upon consideration of the Petition for Rehearing, hereinafore filed herein, and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is denied."

[fol. 174] IN THE SUPREME COURT OF UTAH

PRAECLIPSE FOR RECORD—1948.

To the Clerk of the Above Entitled Court:

Clyde Wilkerson, plaintiff and appellant in the above matter, hereby designates and requests you to transcribe and certify the following material portions of the record to be incorporated into the transcript of record to be transmitted to the Supreme Court of the United States to accompany the Petition for a Writ of Certiorari in said cause to be filed in said Court by plaintiff and appellant.

(References to "R" are to the page numbers of the Judgment Roll and Bill of Exceptions, as contained in the Record on Appeal from the Third Judicial District Court to the Supreme Court of the State of Utah, said numbers appearing at the bottom righthand corner of each page.)

1. Complaint, filed May 27, 1946 (R. 1 to 6).
2. Answer, filed June 19, 1946 (R. 9 to 10).
3. Minute Entry, dated October 2, 1946, by J. Allan Crockett, Judge (R. 15).
4. Minute Entry, dated October 3, 1946, J. Allan Crockett, Judge (R. 16).
5. Defendants' Motion for Directed Verdict (R. 17, 18 and 19), filed October 3, 1946.
6. Verdict, dated October 3, 1946 (R. 31-A).
7. Judgment on Verdict, dated October 3, 1946 (R. 32).
8. Notice of Appeal, filed November 18, 1946 (R. 38).

9. Minute Entry, dated November 13, 1946, by J. Allan Crockett; Judge (R. 37).

10. Clerk's Certificate (Clerk of the Third Judicial District, in and for Salt Lake County), certifying record on [fol. 175] appeal to the Supreme Court of Utah, dated December 12, 1946 (R. 39).

11. The following portions of the Bill of Exceptions, R. 41 to 176, but omitting:

Lines 1 to 24, R. 41, both numbers inclusive.

Lines 27 and 28, R. 42.

Lines 1 to 2, R. 43, both numbers inclusive.

Lines 10 to 24, R. 50, both numbers inclusive.

Lines 18 to 21, R. 68, both numbers inclusive.

Lines 4 to 11, R. 97, both numbers inclusive.

Lines 20 to 28, R. 101, both numbers inclusive.

Lines 1 to 6, R. 102, both numbers inclusive.

Lines 10 to 13, R. 105, both numbers inclusive.

Lines 18 to 26, R. 109, both numbers inclusive.

Lines 1 to 4, and 10 to 17, R. 115, both numbers in each instance inclusive.

Lines 2 to 5, and 21 to 24, R. 140, both numbers in each instance inclusive.

Lines 1 to 6, R. 141, both numbers inclusive.

Lines 26 to 28, R. 171, both numbers inclusive.

Lines 1 to 9, R. 172, both numbers inclusive.

12. Reporter's Certificate (R. 177).

13. Exhibit 1.

14. Exhibit 2.

15. Exhibit 3.

16. Exhibit 5.

17. Proposal for Settlement of Bill of Exceptions, dated November 7, 1946 (R. 185, 186).

18. Acknowledgment, dated November 13, 1946 (R. 187).

19. Order Settling Bill of Exceptions, dated November 13, 1946 (R. 188, 189).

[fol. 176] 20. Appellant's Statement of Errors Relied Upon for Reversal; Brief of Appellant, Filed February 15, 1947, page 17 of Brief.

21. Opinion of the Supreme Court of Utah, filed November 29, 1947.

22. Judgment of the Supreme Court of Utah, dated November 29, 1947. (Minute entry on Judgment: "This cause having been before argued and submitted and the

Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, affirmed, with costs to respondent.")

23. Grounds relied upon by Appellant in support of his Petition for Rehearing. (Petition for Rehearing filed December 31, 1947); page 2.

24. Order by the Supreme Court of Utah denying Petition for Rehearing, filed February 10, 1948. ("Upon consideration of the Petition for Rehearing, heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.")

25. This Praecep*e*.

The portions of the Record designated herein are intended to constitute the record in the Supreme Court of the United States upon Petition for Writ of Certiorari to be filed by the plaintiff and appellant and for review upon said Writ of Certiorari, if granted. Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the United States [fol. 177] Supreme Court concerning Writs of Certiorari and to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated, this 1st day of March, A. D. 1948.

Parnell Black, Calvin W. Rawlings, H. E. Wallace,
Wayne L. Black, Attorneys for Plaintiff and Appellant.

Received Copy of the foregoing Praecep*e* this 1st day of March, A. D. 1948.

W. Q. Van Cott, Grant H. Bagley, Sid N. Cornwall,
Dennis McCarthy, Attorneys for Defendants and Respondents:

[fol. 178] Clerk's Certificate to foregoing transcript omitted in printing.

(Here follow 2 Photolithographs, side folios 179-180)

EXHIBIT 1

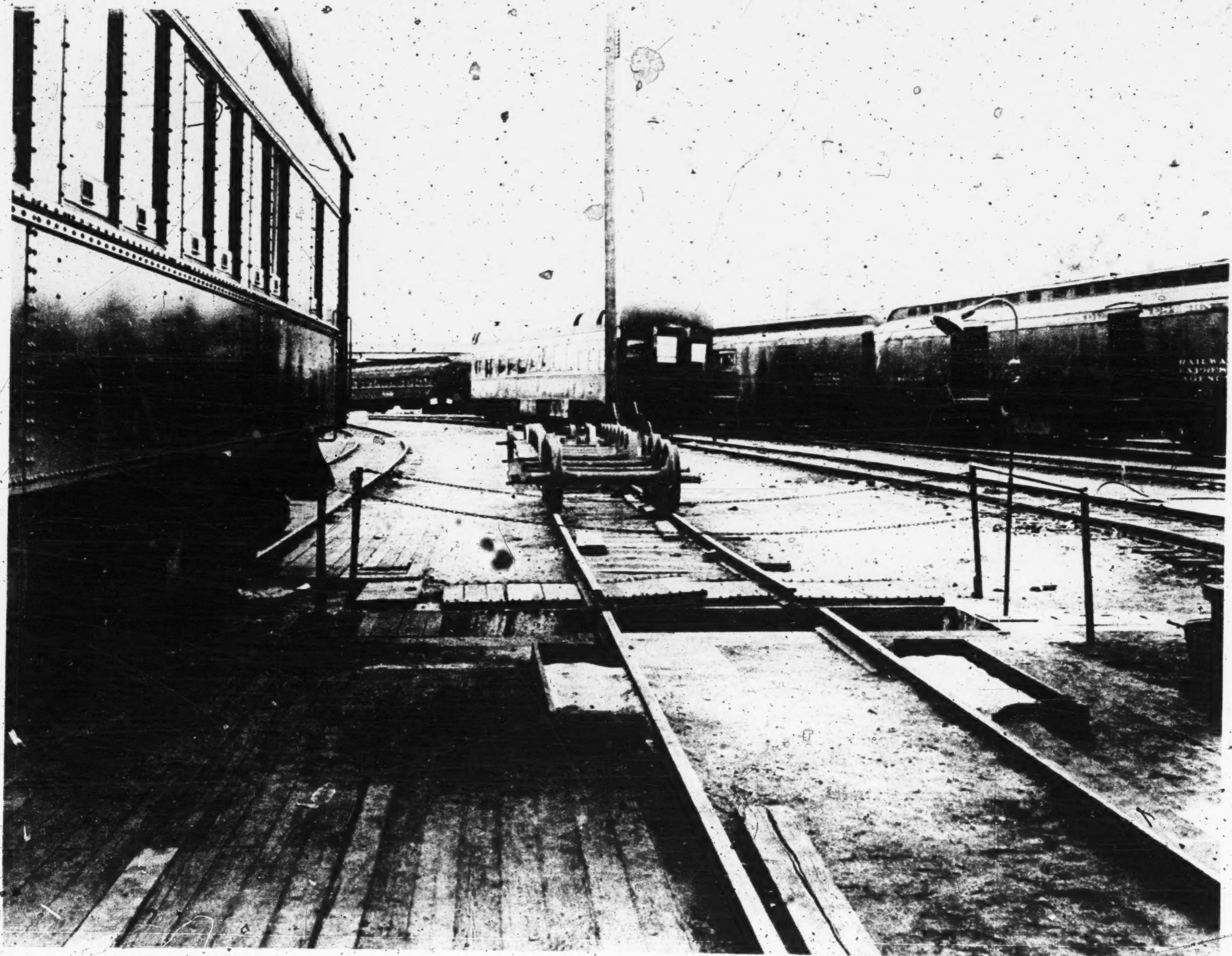


EXHIBIT 5

